

If we talk about Planken, von Opel paid \$70 for every man, woman, and child living in Planken. It would have been the equivalent of paying \$70,000,000 to acquire residence in the District of Columbia.

Of course, Liechtensteinian law, for the purposes of getting revenue, does contemplate exceptions, but it is 3073 normal procedure, which did call for residence both in the community and in the principality.

One exceptional feature, however, in von Opel's case was that he paid this enormous sum of money.

The Court: What is your specific objection to the statement that the Liechtensteinian naturalization law specially permits the principality to waive the condition of residence? Is that a correct statement?

Mr. Burling: "Under extraordinary circumstances." The law is section 6-D. Citizenship may be granted if they have had their permanent residence in the principality of Liechtenstein for at least 3 years; but this condition is not to be fulfilled under extraordinary circumstances, but to ask for special consideration.

The Court: "The Liechtensteinian naturalization law expressly permits under extraordinary circumstances."

Mr. Gallagher: We have no objection to that.

The Court: Now, here is the way I am going to fix this No. 7 and the way I am going to find it:

"On November 21, 1939, Fritz von Opel was naturalized as a citizen of Liechtenstein; however, the only times he was ever in Liechtenstein was when he was traveling through it. He has been in the United States since May, 1940. The Liechtensteinian naturalization law expressly permits under extraordinary circumstances the 3074 principality to waive the condition of residence."

Mr. Gallagher: If I might have just a word to say at that point. With respect to the purpose, the line that we requested, "Fritz von Opel's purpose in acquiring Liechtensteinian citizenship was his desire to sever his ties with

Germany," I submit with respect to that line that the record is absolutely uncontradicted. There is Henggeler's statement, which Mr. Burling referred to, as to the reason why he acquired Liechtensteinian citizenship. That is shown from Plaintiff's Exhibit 49, and I would like to refer to that for just a moment, because in your opinion you made a comment at page 7 also to the effect that until November, 1939, von Opel never had made any attempts to change his citizenship. Well, we submit, Your Honor, that the record reflects quite to the contrary.

Plaintiff's Exhibit 49, which is the Henggeler affidavit, shows that on repeated occasions prior to the war Fritz von Opel discussed the question of acquiring Swiss nationality with Mr. Henggeler. Henggeler goes on to say that after the outbreak of the war Mr. von Opel came to consult him again on this matter and repeated to him that he did not approve of the political attitude of Germany.

Therefore, this affidavit of Mr. Henggeler's, which is evidence, constantly repeats the fact that Fritz von Opel explained to him that he and his wife wished to renounce their German nationality because they did not approve of the political set-up in Germany.

In addition to that, Mrs. von Opel, whose testimony I know you will recollect—

Mr. Burling: You inadvertently read the affidavit incorrectly.

The Court: I do not want to take up a lot of time on this, because frankly—what is it I said about not until 1939?

Mr. Gallagher: In your opinion you said it was not until November, 1939. That is in your opinion.

The Court: All I said was:

•••• In November, 1939, Fritz von Opel, formerly a German citizen, became naturalized under the laws of the Principality of Liechtenstein ••••

I did not say it was not until 1939.

Mr. Burling: In any event, that is what Henggeler's affidavit says. Mr. Henggeler's affidavit reads:

"Mr. von Opel has during the years since the outbreak of the war repeatedly asked me my advise with regard to obtaining Swiss citizenship."

Mr. Gallagher: I think you will agree with me if I point out that that is an error that a foreigner would make in using the words "since" and "before."

The Court: Let me get what you say is wrong. I 3076 have got to get this in my mind.

Mr. Gallagher: First of all, in your opinion you said:

"*** It was not until November of 1939, after World War II had begun, that Fritz von Opel took any steps to change his citizenship."

The Court: Where is that?

Mr. Gallagher: I believe that is on page 10 of your opinion, as I have it typed here—the top part of the page, about ten lines down.

The Court: That is right.

Mr. Burling: That is what the record shows.

Mr. Gallagher: I submit it absolutely does not, Mr. Burling. You are standing on the word in the second paragraph in the affidavit.

If you will just bear with me a moment to clarify this, Your Honor, foreigners use the words "since" and "before" mistakenly many times. You will find that is true among foreigners. You will find it with the Spaniards. I will show how they have used this thing. You will see when you read the contents. The second paragraph of Henggeler's affidavit says:

"Mr. von Opel has during the years since the outbreak of the war repeatedly asked my advice with regard to obtaining Swiss nationality."

I say that that word "since" is "before," for the following reason: He goes on to point out what the requirements were to become a Swiss. Now, further he says:

"After the outbreak of war, Mr. von Opel came to consult me again in this matter and repeated to me that he did not approve at all of the political attitude of Germany."

I submit that that paragraph shows clearly that Mr. Henggeler in using the word "since" used it interchangeably as foreigners mistakenly do in translating "since" and "before."

If there were any question, or if we had thought your Honor was going to make a finding that that was the first time that Fritz von Opel had made any endeavor to change his citizenship, we would have introduced further testimony, because Mr. von Opel in the middle 30s had an immigration visa to come to the United States. That is out of the record, I admit.

The Court: He did not take any steps except to talk to Henggeler.

Mr. Gallagher: As far as the record reflects, he tried before the war to become a Swiss.

Mr. Burling: The record does not reflect that.

Mr. Gallagher: This affidavit does.

Mr. Burling: This is a fantastic waste of time. The affidavit says that since the outbreak of the war von Opel has done something.

3078 Mr. Gallagher: I will show the affidavit to Your Honor (handing a paper to the Court).

The Court: What I am trying to get at is even if he did talk to Henggeler before, it would not be taking any steps; it would be a discussion.

Mr. Gallagher: That is not a matter in issue. I am merely pointing out that in your opinion—it is not in your findings—you make that statement which we feel from Henggeler's statement is not accurate.

The Court: I think this finding of fact I make here does not deal with that subject matter, and if the opinion is contrary to the evidence in the case, then you can argue that to the Court of Appeals. That will be in the record.

Mr. Gallagher: All right, Your Honor.

The Court: I won't make any finding on the subject at all other than this opinion. I will leave No. 7 the way I have it. Do you understand how it is now?

Mr. Boland: Yes, Your Honor.

The Court: Now, let me turn to No. 8 for a minute.

Mr. Burling, have you No. 8 there?

Mr. Burling: Yes, Your Honor.

The Court: See if you can follow this:

"Fritz von Opel's naturalization in Liechtenstein was accomplished under a waiver"—Would that be all right?

"a waiver of the usual naturalization laws."

3079 Mr. Burling: I have no objection to that.

The Court: I think it is probably a little better than the way it is.

Mr. Burling: I have no objection.

The Court: "which provide for extensive residence."

How about a period there? Was there a special act required?

Mr. Gallagher: For all naturalized citizens. Anyone who was naturalized in Liechtenstein had to be approved by the Parliament.

Mr. Burling: But anyone who does not take the oath of allegiance, who does not even come to the country—

The Court: Why don't we say:

"Any person who does not take the oath of allegiance under the laws of Liechtenstein"

would have to do what?

Mr. Burling: The waiver had to be granted by the Parliament in his case. It is true that even if you comply

with the ordinary law, Parliament must approve the naturalization; but where this extraordinary cause comes in, then I believe Parliament determines the existence of that.

Mr. Boland: The statute itself says nothing about a special act being required in respect of extraordinary circumstances. If you recall, at the time we had Dr. Kauffmann, we tried to get him to testify as to what the 3080 law or custom was over there, and the custom is that if you reside in Switzerland, that is an extraordinary circumstance.

The Court: Do we need this last sentence?

Mr. Boland: That is what we object to.

Mr. Gallagher: We object to the inference that is drawn from the way in which this is drawn.

Mr. Burling: I do not believe it is important.

The Court: Let us put a period there.

Mr. Gallagher: Strike out from the word "and"?

The Court: No. 8 will read:

"Fritz von Opel's naturalization in Liechtenstein was accomplished under a waiver of the usual Liechtensteinian naturalization laws that provided for extensive residence—"

Mr. Gallagher: Could we change that to "three years' residence"?

Mr. Boland: The statute says three years.

Mr. Burling: I think if Your Honor is going to cut it down, it might be appropriate also for Your Honor to find that in connection with the obtaining of this waiver von Opel paid approximately \$10,000, two-thirds to the community and one-third to the principality.

Mr. Boland: Where are you putting this, Your Honor?

The Court: In connection with obtaining, he wants to add, at the end, "In connection with obtaining 3081 waiver."

Mr. Boland: "That in connection with obtaining his citizenship he paid."

The Court: All right.

Mr. Boland: "In accordance with the provisions of the naturalization law."

The Court: "In connection with obtaining his citizenship, Fritz von Opel paid"—how much?

Mr. Burling: Approximately \$10,000 in all, two-thirds to the community and one-third to the principality.

Mr. Boland: "In accordance with the naturalization laws."

Mr. Burling: No, if Your Honor please, it was not.

The Court: Two-thirds to which?

Mr. Burling: Two-thirds to the community and one-third to the principality.

The Court: Let me hear what you want, Mr. Boland.

Mr. Boland: We would like there "in accord with" or "pursuant to the naturalization laws," or however the naturalization laws require payment for acquisition of citizenship.

Mr. Burling: The Act contemplates some payment.

Mr. Boland: Payment or purchase price.

The Court: Then, just say "the naturalization laws of Liechtenstein."

Mr. Boland: "Require payment."

Mr. Burling: Would Your Honor say, "some payment"?

The Court: "Require some payment."

3082 Mr. Boland: "for acquisition of citizenship through naturalization."

The Court: "acquisition of citizenship by naturalization."

Mr. Boland: Yes.

The Court: All right.

" * * * require some payment for acquisition of citizenship by naturalization."

Finding No. 8 would then read:

"Fritz von Opel's naturalization in Liechtenstein was accomplished under a waiver of the usual Liechtensteinian naturalization laws which provide for extensive residence. In connection with obtaining his citizenship, Fritz von Opel paid approximately \$10,000, two-thirds to a community and one-third to the principality. The naturalization laws of Liechtenstein require some payment for acquisition of citizenship by naturalization."

Now, finding No. 9, I would add at the end of 9:

"The oath was not prerequisite to naturalization."

Mr. Boland: There is an additional point, Your Honor. Section 14, if you will bear with me—it is very short—reads:

"It is within the jurisdiction of the executive or an authority empowered by him to administer citizenship oath after the state citizenship has been granted. The citizenship oath has only to be taken by male citizens of 3083 full age."

I am advised that the translation of the words "within the jurisdiction" is rather difficult. I do not know anything about it except that I am advised by Dr. Kronstein and Dr. Kanfmann, and that there is no question in reading the German, that what this means is that it is within the discretion. It is a little short of the word "discretion," but there can be no other interpretation than that it is really within their jurisdiction to require the oath, and that is what we have in mind by saying that the record is barren of any request of Fritz von Opel to take an oath.

Mr. Burling: I submit, Your Honor, that we should not now, at this time, start taking any expert testimony as to what the translation is. I am advised just the opposite.

The Court: I agree with you on that.

Mr. Boland: As a matter of fact, the record itself, if you read this, may not mean anything other than discretion.

Mr. Burling: Will Your Honor also consider the sentence which reads:

"The citizenship oath has only to be taken by male persons of full age"?

Mr. Boland: That is right. Therefore, it can't be required of anyone other than male persons.

Mr. Burling: I did not know that there was any contention that Fritz von Opel was either a child or a 3084 woman.

Mr. Boland: There is not. It is in their discretion to request male persons of full age to take the oath, and they cannot require anyone else to take the oath.

Mr. Burling: I submit the contrary; that the common sense, plain, obvious meaning of the first sentence is that the person before whom the oath is to be taken is the executive or authority empowered by him.

The Court: Of course, the simplest thing to do—This is in evidence, isn't it?

Mr. Boland: Yes, Your Honor.

The Court: (Continuing) Is to copy it in, then.

"Under the laws of Liechtenstein, it is within the jurisdiction of the executive or authority empowered by him to administer the citizenship oath after the state citizenship has been granted."

Do you want this "male" business in there?

Mr. Burling: I certainly request it.

Mr. Boland: Yes, I think it would be helpful to us too, Your Honor.

The Court: All right. I will just copy that in bodily.

What about No. 10?

Mr. Gallagher: I should like, if I may, to take a few minutes' time on that one.

The Court: Let me say this one thing. I have pretty well made up my mind. I frankly believe Mr. Houghland's testimony.

Mr. Gallagher: Mr. Calvin Houghland, do you mean?

The Court: And the boy's too, as far as that goes.

Mr. Gallagher: That is Calvin and Mason.

The Court: I believe both of them in regard to these discussions. Contrary to your view, I put a good deal of credence in what both of them said. If there wasn't any testimony with regard to that, then I might be susceptible to the argument. Frankly, gentlemen, I tried hard to keep out of these findings a lot of reasons, because they are not part of the findings, any more than a jury when it passes on facts tells why it reached its conclusions.

With regard to witnesses as they came on the stand, I wrote in my notes, as they were testifying from time to time, certain temporizings I thought some of them were guilty of and certain good points I thought had been made, and this was, frankly, the net result of my views with regard to that situation.

If there is no testimony to support it, then I will hear you on that; but if there was, on the weight of the evidence I do not think there is the remotest chance of my changing my mind.

Mr. Gallagher: Then, I submit, Your Honor, if I may be so bold as to say so, that there is nothing in the record to support your finding that "at all relevant times" 3086 Fritz von Opel indicated a continuing sympathy for and allegiance to Germany, his native country."

There is no statement in the record that would in any wise bear out Your Honor's findings.

There is the statement of Mason Houghland, purportedly in August, 1939, with respect to the transchannel call—Your Honor said that this was highly improbable—that took place with his father. That is the only time he says anything.

The only time Calvin says anything is in the early summer of 1940, a year and a half before the United States goes into the war. The record reflects that he said, as I remember it:

"I said to von Opel that it might be a very long war and the United States might even get into it, and he said or replied, 'No, it will be a short war, and we will win, because we have a lot of secret weapons.'"

That is the way he quoted what he said von Opel said. Even reading just that language, you cannot in any wise conclude that von Opel's statement meant the United States was going to get into the war. Certainly in 1940 if a person was for or against Germany, as many Americans were, that certainly was not a sin; we were not at war at the time.

The Court: I do not think it is a sin for him to like Germany right down to this minute; as a matter 3087 of fact, I think it is a sin for him not to. I do not hold that against him.

Mr. Gallagher: There were too many hundreds of thousands of Germans who came to this country and declared their allegiance.

When we get down to what this record reflects—and I can't bring this out too strongly, Your Honor, because we are going to stress this on other claims—there is only one relevant period of time in this whole case. Mr. Burling has made a lot of going back to 1931. The only way we had to put our case in was, in a sense, to exhibit what their defense was, so we could make a coherent story in the light of the Supreme Court opinion. But there is no relevant time in this case—none whatsoever—until December 7, 1941—from then until the date of vesting.

On December 5 the plaintiff corporation could have been loaded with the top members of the Nazi hierarchy—Hitler, Goering, Goebbels. Those men could have been the directors instead of Frankenberg, Meier, and Henggeler.

They could have had the top members of the Nazi hierarchy. They could have come in and sold stock on the Swiss Exchange validly and the Swiss could legitimately have walked in and bought it on December 6, and we could not have touched that property.

Even though Mr. Burling has tried to say what happened in 1936, 1937, 1938, 1939, and 1940, it is meaningless. You have two statements in this record, and they are all you can look to for support in your findings. That is Mason Houghland's statement which purportedly happened on a transchannel call; and Calvin Houghland's statement as to what he says Fritz said in 1940 at the time when we were not in the war, even if it was said, which, of course, we deny. But even so, if that statement as made, it was made a year and a half before any relevant time for the purposes of this case.

What does the record reflect to the contrary? We have the record replete and uncontradicted that Fritz von Opel worked constantly with Colonel Charles Mettler of Army Intelligence. He lend great aid to our war effort during the war years. In 1942 he was assisting materially the British war effort. He designed airplane fasteners which our Air Force used. He developed a forging process which our War Production Board took over. During the time he was in internment, the man was consulting with Army Ordnance and Army Intelligence. That is completely uncontradicted. If that was not the truth, the defendant would have brought Colonel Charles Mettler here. But I will tell you why they did not bring him. Not only is it the truth—and we tried to get him up here and asked that he be heard—but in the prior deposition—although this is out of the record—it stated—

Mr. Burling: If we are going to go out of the record, I may say that I was assistant director of the Enemy Alien Control Unit during the war, and I know very well why von Opel was interned. If we are allowed to go out of the record—

The Court: Of course, I can't do that.

Mr. Gallagher: I am talking about what the record states. The record, uncontradicted, shows that Fritz von Opel rendered valuable aid during our war effort, during the war years. He was producing fasteners for the British in our war effort in 1940.

Against that there is the one, single unsupported statement of Calvin Houghland that in the early summer of 1940 Fritz said, "Germany will win the war in short order." The only thing in this record as to relevant time is from December 6 or 7, 1941, to the summer of 1942.

The Court: Let us see about this. Suppose I made this finding:

"Statements made by Fritz von Opel after 1939, when he became a naturalized citizen of Liechtenstein, indicate a continued allegiance to and sympathy for Germany."

I will stop there. That is what I said on page 10 of my opinion.

"Statements made by Fritz von Opel after 1939, when he became a naturalized citizen of Liechtenstein, indicate a continued allegiance to and sympathy for Germany."

Stop there.

Mr. Buring: If Your Honor please, there is more in the record than the statements. I believe, Your Honor, that there is a showing also that in 1939 the fourth largest fabricator of aluminum wrote to him saying, "You will do a great service for Germany and for the entire German war economy if you will tackle the problem of increasing bauxite production with all your energy."

He replied that he would do so. He replied, "I stand by my prior offer," which was to go to Budapest. Then he went to Budapest and was there in November at the time that his naturalization in Liechtenstein became complete.

and he negotiated a contract for the production of a hundred thousand tons of bauxite.

The Court: Was that before 1941?

Mr. Gallagher: Certainly.

Mr. Burling: The contract was to run. It was negotiated in 1939 and entered into in 1940.

The Court: That would come within this finding. I could say, "Statements made and acts performed."

Mr. Gallagher: First of all, there were not statements made after 1939. The only statement in the record is Houghland's statement as to what Fritz said in 3091, the early part of 1940. So "statement" would be the most you could say.

Mr. Burling: He made several statements in the course of that conversation. He made the statement that he was pleased at the great German military successes; he made the statement that it would be a short war, "which we are going to win." He said he was gratified that he had contributed to the German success by inventing rockets.

The Court: You won't have any trouble with that. If the Court of Appeals finds that there is only one statement in that one conversation, why, it can take care of that all right. I think I ought to say, however, "Statements made and acts performed after 1939, when he became a naturalized citizen of Liechtenstein, and before the outbreak of war with the United States."

Mr. Gallagher: All right; put that in.

The Court: I am trying to be fair to you, because there was no evidence that it was. I am substituting for No. 10:

"Statements made and acts performed after 1939, when Fritz von Opel became a naturalized citizen of Liechtenstein, and before the outbreak of the war with the United States, indicated a continued allegiance to and sympathy for Germany."

Mr. Gallagher: I do not see what acts Your Honor is talking about.

The Court: What he talked about on the bauxite.
 3092 That was before the war with the United States.

This just deals with the Liechtenstein situation.

Mr. Gallagher: How are you going to revise it?

The Court: "Statements made and acts performed by Fritz von Opel after 1939, when he became a naturalized citizen of Liechtenstein, and before the outbreak of the war with the United States, indicated a continued allegiance to and sympathy for Germany."

Mr. Gallagher: Continued allegiance and sympathy to Germany when?

The Court: For that period.

Mr. Gallagher: Would you add that on: "existing during that period"?

The Court: I think this is plain enough. It indicates continued sympathy.

Mr. Gallagher: During that period. That is all the record does reflect, Your Honor.

The Court: It indicates continued sympathy to Germany. It just does not say how long it continued.

Mr. Gallagher: But there is nothing in the record contrary to the aid he gave our Government.

Mr. Burling: If Your Honor please, there is no testimony except Fritz von Opel's, whom you obviously did not believe.

Mr. Gallagher: Which could have been contradicted if you had wanted to bring Mettler.

The Court: Gentlemen, I think this covers it, really. His statements indicated an allegiance to and sympathy for Germany. Anything I would say there would not be intelligent beyond that statement right there. We are talking about that time.

"Statements made and acts performed by Fritz von Opel after 1939, when he became a naturalized citizen of Germany"—

Mr. Gallagher: "of Liechtenstein."

The Court: Just say: "between the time in 1939, when he became a naturalized citizen of"—

Mr. Gallagher: "Liechtenstein."

The Court: I mean of Liechtenstein. (Continued) "and before the outbreak of war with the United States, indicated a continued allegiance to and sympathy for Germany."

Mr. Gallagher: Look at your opinion, then, again, Your Honor, on page 10, where you pointed out to me that next sentence:

" * * * in technical form Fritz von Opel is a citizen of a neutral country, but I find beyond doubt his fealty at all times has been to his native country of Germany."

The Court: I am going to consider amending this opinion in that regard. I made a note of that. I will 3094 give some thought to that.

Mr. Burling: I think that the record would justify Your Honor in making a finding in language—I do not ask for it; I am seeking to avoid having the opinion re-written—

The Court: I was not going to rewrite it. The only thing I was thinking about doing was, in the light of these amendments and discussions, by way of a supplementary memorandum. I might say that the written opinion rendered in the case has been amended by striking out so and so. If you want me to leave it in and have some reason, I shall be glad to hear you.

Mr. Burling: Yes. I think the record does justify a finding that at all times the record starts off with his prominence in Germany—it warrants a finding that his purpose in staying outside of Germany was definitely to hold the money outside of the Foreign Exchange Controls; his close association with his father and his father's association with the Nazi Party; his statement to Houghland—Mason Houghland—about the Polish war and what "we" are going to do; his statement as to how he had bought

a Liechtenstein passport to fool the British; his extensive statement in Nashville in the spring of 1940; his statement in 1941, when—

The Court: When was that passport incident? I remember that I had that in mind.

Mr. Burling: In the spring of 1940, in Mason 3095 Houghland's house. But Calvin Houghland testified to it.

The Court: Yes.

Mr. Burling: Then, in January, 1941, Your Honor will recall, Mason Houghland said to him, "You should not have those navigational maps. If we go to war, and you are a German, and you get caught with those in your possession, they will get you in trouble."

He did not deny in any way that he was a German.

Then, the record goes on to show that he was interned by the Attorney General as a potentially dangerous alien enemy all during the war. He was not released until after hostilities were over. The only evidence to contradict that is his own statement as to how helpful he was; and I submit that the best evidence of that is that after he purportedly and allegedly helped the services, he remained in internment right up to the end.

I submit also the inference is warranted from his deal with Colonel Mettler, in that he was to stay in Miami, Florida, under much pleasanter conditions of detention than the camp to which he was sent.

Mr. Gallagher: I might say that you have been talking about the opinion when we were talking about the finding. How is the language going to read as to finding No. 10, because I have one further remark to make, if I may?

The Court: "Statements made and acts performed 3096 by Fritz von Opel between the time in 1939, when he became a naturalized citizen of Liechtenstein, and before the outbreak of the war with the United States, indicated a continued allegiance to and sympathy for Germany."

It is limited to that period.

Mr. Gallagher: Your Honor, with respect to that, with the word "allegiance" we take considerable serious issue, if you are going to amend the finding to the effect that he still had continued allegiance to Germany, then we would have to move to re-open and take testimony in that regard. This was not in issue at any time during the course of this proceeding.

The Court: What I was talking about—"allegiance" is almost synonymous with "sympathy."

Mr. Gallagher: If you strike the word "allegiance," we have no objection.

The Court: That is all right. Is there any reason why it should not be stricken?

Mr. Burling: I think Your Honor weakens the point very greatly. I think "allegiance" is a stronger word. The man was born a German. He was a very prominent person in Germany. For personal and financial reasons he goes outside of Germany but keeps coming back. His visits totaled three a year. There is all this evidence of broad Nazi sympathy.

Mr. Gallagher: My friend must have known that that was in the case, because he kept talking about it and 3097 kept examining him on his father's Nazi activities.

One of our main contentions, if Your Honor will remember—the last line—there—related to the citizenship.

The Court: Frankly, I do not know whether or not the word "allegiance" is misleading. What I really meant was that it indicated a continued interest in the welfare—

Mr. Gallagher: That is what I mean.

The Court: I do not want to force a technical term on them in that regard. I do not mean to find that failure to take an oath of allegiance was fatal to his citizenship. What I am trying to get at is his leaning that way.

Mr. Burling: May I suggest that the word "limited" be substituted?

Mr. Gallagher: No, Your Honor. Crittenden, their witness, testified on the stand that von Opel deplored what the Nazis had been doing around Berlin. That is in the record, page 1913.

Mr. Burling: The character of that deplored was that the buildings were shabby and that they had cut down trees on the Unter den Linden.

Mr. Gallagher: He is still criticizing the Nazis.

Mr. Burling: That is bitter criticism of one's government!

Mr. Gallagher: He was never in Germany—

Mr. Burling: I have heard people criticize the 3098 present Administration—

The Court: This is what I have decided to do. Findings of fact, when you deal with submitted, formal findings of fact, really are on the inclinations you have. Inferences drawn from them in the opinion do not make additional findings, as I understand it. In other words, if they are inconsistent with them, then they should be stricken; but if they are consistent with the findings, they can very readily remain. So I think I will make that change, but I believe I will let that opinion stay as it is.

In other words, I have the feeling that Fritz von Opel continued to like Germany, and I just don't know how to get away from it. If that does not follow from the testimony or from this finding I have made here, then you are entitled to argue that that is illogical and unreasonable. The only proposition is this: Mr. Burling's attempt, as I understood it throughout this trial, was to indicate that Fritz von Opel, at least to a large extent, had maintained a very great interest in the affairs of Germany. He went so far as to say that this Liechtenstein citizenship was a completely bogus affair, although he said it was accomplished, and he made a whole lot of point about the lack of allegiance. He was pointing that up. Of course, I would have taken your testimony on it if you had offered it.

Mr. Gallagher: If you are still going to use the
3099 word "allegiance"—

The Court: I have stricken that out. I have changed
it this way, now:

"Statements made and acts performed by Fritz von Opel
between the time in 1939 when he became a naturalized
citizen of Liechtenstein and 1941, when war was declared
with the United States, indicate a continued interest in the
welfare of and sympathy for Germany."

The point I was talking about is that I do not see much
use in amending my opinion on it.

Mr. Gallagher: The finding would govern rather than
the language of the opinion, is my understanding?

The Court: Unless the language of the opinion is incon-
sistent with the finding. The language of the opinion will
stay; but if it is inconsistent with the finding, then the
Court of Appeals will just say I went too far on it. I do
not want to begin amending this unless it is plainly incon-
sistent. That was the point that you made on page 8.

Mr. Gallagher: You said on page 10:

• • • but I find beyond doubt his fealty at all
times • • •

Mr. Burling: So it is.

Mr. Gallagher: There is in the record to support that
statement Your Honor, I submit—

The Court: Well, I do not think background would
3100 be evidence of it. I do not think it is evidence.

Mr. Gallagher: His background certainly would
not indicate his fealty for Germany.

The Court: I will give it a little more thought. I have
got the point of both of you.

Mr. Gallagher: All right, Your Honor. The next one is
finding No. 18.

Mr. Boland: Your Honor, the only point we have in find-

ing No. 18 is the possibility for us that perhaps this finding might exclude the fact that full title to the shares had been passed to Fritz in the case. Our amended finding is designed to take care of that one part only. You see, the words "intended to be a gift of part interest" might lead one to conclude he had not gotten full title. If there is a finding to the effect that he did get full title to the stock, that is the only change we have.

Mr. Burling: I have no objection to that part of the amendment which works that change—the second sentence of the proposed finding. But I believe the remainder of that proposed finding anticipates finding No. 32 and merely confuses that point.

Mr. Boland: I have no objection to the addition:

"Legal title passed to Fritz von Opel."

The Court: "Legal title to the von Opel shares passed to Fritz von Opel by the agreement."

3161. Mr. Boland: "Legal title to the 600 Opel shares passed to Fritz von Opel."

The Court: What is the date of the agreement?

Mr. Boland: October 5, 1931, Your Honor.

We thought it well to add as a finding that which you stated in your opinion at page 6 and have added an additional sentence:

"The purpose of the gift was to provide for payment in the form of gold or American currency on the sale of the Opel stock and to make financial provision for Fritz von Opel."

The Court: You have no objection to that, have you?

Mr. Burling: No, if I understand it correctly.

The Court: All right.

Mr. Gallagher: The next suggested change, Your Honor, is finding 29. Your finding as it now reads is:

"The record is bare of any evidence of who voted the shares of Transdanubia Bauxit, A. G. from 1940 through 1945, inclusive."

Our suggested finding is:

"After December 6, 1941, the shares of Transdanubia Bauxit, A. G. were retained by the plaintiff corporation in its safe and were not voted from that time on."

In support of that suggested change, we refer to the record, pages 2269, 2271, and 2320, the testimony 3102 of Eugen Meier, President of the Korporation.

The Court: Is there any objection?

Mr. Burling: Oh, yes, there certainly is, Your Honor. The record is bare; Your Honor's finding is correct.

Mr. Gallagher: The record references are at page 2269. Mr. Burling is questioning. He says:

"At any rate, you do not deny that Transdanubia Bauxit was wholly owned by Uebersee at all times after December 6, 1941?"

"Answer: I believe yes, but there was nothing we could do about it, because nobody would have bought these shares from us. If we would have sold the shares, we would have to sell them to persons within the German territory—that is, enemy territory. Thus we kept the shares in the safe and we did not do anything about them."

That is one statement of his.

The Court: That has to do with disposing of them. He is talking about voting.

Mr. Gallagher: He said they did nothing about them. The next reference is at page 2271.

"Question: You not only did not sell it; you watched over and supervised the investment; isn't that true?"

"The Witness: It was there and we did not sell. It was there and it stayed there; and we kept it there 3103 until the postwar period, and there it is now.

"May I ask a question: What should I have done?"

The next reference is at page 2320:

"Question: Well, didn't you take any action with respect to voting that stock for all those years?"

"Mr. Gallagher: State the years. Will you give them again?"

"Mr. Burling: 1941 through 1945, inclusive."

"The Witness: I stated the matter this morning. I did not do anything."

Mr. Burling: "I did not."

Mr. Gallagher: That is right. You yourself in questioning Mr. Meier referred to him as being chief officer and the man who took over all duties of the corporation after Frankenberg had departed.

The Court: The record is bare of any evidence whether the shares, and so forth, were voted; and if so, who voted them. That will do it.

Mr. Gallagher: We suggest, Your Honor, that the record would not support that finding.

Mr. Burling: The record is absolutely bare as to whether Henggeler did or did not vote the shares.

Mr. Gallagher: You mean Meier?

Mr. Burling: Henggeler. I agree with you that Meier said no, but Meier did not vote the shares. But 3104 one of the three may have.

The Court: What is the matter with this:

"The record is bare of any evidence as to whether the shares of Transdanubia from 1945, inclusive, were voted; or if so, who voted them?"

What is wrong with that? We just do not know whether they were voted; or if they were, who did it. I think that is all right. I will run along with that, unless you find some very strong objection to it, because that is what the record is, I am sure.

Now, I think finding No. 30 is next.

Mr. Gallagher: Our suggested finding there is:

"While attempts were made prior to December 7, 1941, to sell or lease the Transdanubia Bauxit properties, no attempt was made after December, 1941. However, no control was exercised by the plaintiff corporation over its subsidiary corporation after December, 1941. Nor, at any time, did plaintiff corporation ever receive any income from Transdanubia Bauxit, A. G."

I think the record is quite clear on that. We have in the record, at pages 1496 and 1502, Plaintiff's Exhibits 70, 71, 72, and 73, which were cables back and forth, as you will recollect, and the letter, Plaintiff's Exhibit 70, from von Opel, instructing them to sell it or lease it.

The Court: Let me suggest that we change finding No. 30 to read:

"After December 7, 1941, plaintiff corporation never took any affirmative steps to sever its relations."

Now, Mr. Burling, what about this "no control"?

Mr. Burling: That is the point I argued at such great length.

The Court: You mean there is no evidence?

Mr. Burling: I submit it is proper for Your Honor to make a finding that there is no evidence, because the burden of proof is to show non-control.

The Court: That is what I was going to say. Is there no evidence one way or the other on it?

Mr. Burling: Meier testified that he personally did not do anything about it. The books were first in Henggeler's and then in Gaeng's custody; and the record is bare as to what they did about it.

Mr. Gallagher: Meier was the president of the corporation, as you recollect, Your Honor. He was the one, sole member of the board of administrators who at all times was a member, Henggeler having resigned in 1942, and Gaeng having taken his place. He is the man whom Mr. Burling repeatedly in the record calls the chief officer for

the corporation after Frankenberg's departure for the United States in 1940.

The Court: How can I say there is no control?

Mr. Gallagher: His statement is that "we did absolutely nothing"—never contacted them, never got in touch with them, never did anything about it. The record is replete with statements in that respect.

Mr. Burling: The record shows that whatever was done, the handling of the guarantee was handled by Henggeler. Meier was off somewhere else and did not have the books. I could not find out when he had last even seen the books.

Our position is—and I am sure Your Honor recalls—that there is absolute failure of proof to show what happened to Transdanubia after December 7, 1941, except for Henggeler's activities in connection with the guarantee. There is no evidence except that Meier did not do it and Frankenberg did not do it, but the remaining director knew who had the books and may or may not have voted the stock and communicated with the directors, and so on.

Mr. Gallagher: The books of the corporation reflect that the investment was written off.

The Court: Frankly, a study of the testimony in that regard left me very much undecided about this proposition. My recollection of it was very general on it. I do not think that that would justify, in the absence of more authoritative evidence, my making a finding one way or the other about the control. I think I will let finding No. 30 stand with that amendment:

"After December 7, 1941, the plaintiff corporation 3107 never took any affirmative steps."

Isn't that finding of the evidence in No. 31 right?

Mr. Gallagher: No.

The Court: I know you objected to some testimony there.

Mr. Gallagher: You have the finding there:

"and, during this period Transdanubia Bauxit, A. G. shipped bauxite to Germany."

There is only one exhibit, which you will recollect we objected to, in this record, Defendant's Exhibit 90, a letter dated February, 1942. That letter reflects bauxite shipments in October, November, and December, 1941. It reflects approximately 1,600 tons of bauxite in October, approximately 1,100 tons of bauxite in November, and approximately 600 tons of bauxite in December.

Hungary and the United States were not in a state of war until December 13.

That is the only thing in the entire record which in any wise would indicate any shipments of bauxite to Germany or elsewhere. We submit that with that showing of a falling off of from 16 to 11 to 6, with a declaration of war taking place on December 13, it would be just as reasonable to conclude, if not more so, that no further shipments were made or that they ceased with the declaration of war. There is not one other line of evidence in this record about shipments during the war 3108 period.

The Court: Why don't we say, "During the months of—"

Mr. Burling: May I object? I do not agree at all with the statement of the evidence.

Mr. Gallagher: All right; take it and look at it.

Mr. Burling: In the first place, there is additional evidence besides this letter that showed a shipment and gave the total quantity shipped.

Mr. Gallagher: What is the exhibit number?

Mr. Burling: Defendant's Exhibit 90.

Mr. Gallagher: That is what I am speaking of, the letter of February, 1942. That is the only one in the record. All the others were withdrawn by Mr. Burling himself.

Mr. Burling: I find I am wrong on the subject of this

particular letter. However, I will address myself to the contract. Your Honor will recall that Fritz von Opel negotiated a contract to ship bauxite to Giulini Brothers in Germany, and the contract called for shipments in 1940 and 1941 and a shipment of 40,000 tons in 1942. There was a showing that there were shipments made in October, November, and December under that contract of 1941, the contract to run all through 1942, and no showing whatever of cessation. I believe the record does support the finding that there was shipment of bauxite during the war.

Mr. Gallagher: But no showing that this contract was in any way complied with.

3109 The Court: You had Fritz von Opel's efforts to speed it up, and then you had this letter of February 4, 1942, which evidently dealt with shipments in October, November, and December in 1941. Did you have any after that?

Mr. Gallagher: Nothing.

Mr. Burling: Nothing except the fact that the contract which von Opel negotiated called for shipments in 1942.

The Court: Yes, but that would not indicate shipments in there. You have already said there was nothing done to stop it. He is just saying here that during October, November, and December, 1941, they shipped bauxite.

Mr. Burling: Would Your Honor also find that there was a contract to ship bauxite during 1942 and that the record is bare of any evidence that that contract was terminated?

Mr. Gallagher: Then, I would have to request also the making of a finding so that the findings themselves reflect what our exhibits 70 through 73 indicate: that Fritz von Opel gave instructions to sell or lease the mines in the spring of 1941 and refused to advance any further payments to the corporation, although requested on many occasions by them to advance for mining operations. That is right in the testimony here. Those exhibits are in without objection.

Mr. Burling: I agree that there are exhibits in. They state that Fritz von Opel suggested leasing.

The Court: What do you say about the contract?
3110 Mr. Burling: I say the contract called for shipment of 40,000 tons of bauxite to Germany in 1942.

The Court: By contract executed when?

Mr. Burling: March, 1940.

The Court: By Transdanubia?

Mr. Burling: And Giulini Brothers.

The Court: Transdanubia agreed?

Mr. Burling: Transdanubia agreed by contract.

The Court: Transdanubia agreed to ship bauxite to Germany until when?

Mr. Burling: Until the end of 1942.

Mr. Gallagher: With respect to the exhibits—I will show them to you so that you can refresh your recollection—they were the letters where they are asking for further money, and von Opel cables thereafter refusing to give it to them and telling them to try to lease or sell the mines.

I should like a finding to the effect that Fritz von Opel refused to advance any funds to Transdanubia after March, 1941, for furthering the operations of the mine and gave instructions to the corporation to endeavor to sell or lease the mine.

Mr. Burling: He did not give instructions, if Your Honor please; he suggested in the alternative.

Mr. Gallagher: All right; change it to that—"suggested."

3111 The Court: Bring that in at 2 o'clock.

Mr. Gallagher: All right; I will write it up. That is finding No. 31, Your Honor. We will rewrite it during the recess.

The Court: Now, finding No. 32.

Mr. Boland: Finding No. 32 is very simple.

The Court: The only thing you want is "dividends" substituted for the word "interest"!

Mr. Beland: Yes, Your Honor.

The Court: Is there any objection to that?

Mr. Boland: Actually, to quote the gift agreement verbally, it is "dividends and interest of the gift."

The Court: "80 percent of the dividends and interest."

Is there any objection to that?

Mr. Burling: We have no objection to that change. I should like to point out in general that the usufructuary interest was reserved—that is, the in rem interest was reserved—in all, not 80 percent. The testimony is that there was an in personam right—

The Court: That is covered somewhere else.

Mr. Burling: I do not think it is material.

The Court: You can leave out "intended" and say "agreed to have."

"It was agreed that Wilhelm and Marta should have."

Mr. Boland: All right.

3112 Mr. Burling: I do not think it was, if Your Honor please. My own position is, if you will recall, that Miss Schoch testified that the legal situation would be that the usufruct to the income was 100 percent to the parents, except to an in personam right which Fritz had to 20 percent.

The Court: The only thing I am trying to get at is this: I can say:

"A usufruct interest was established in their favor"—period. I would stop right there. That is all I was trying to get at in that point. Then I could define it later.

Mr. Boland: That is all right.

The Court: Since we cover that later, why don't we stop right there?

Mr. Burling: Yes, Your Honor.

The Court: Now, finding No. 36.

Mr. Boland: I would say the finding of the Court may be subject to an ambiguous interpretation. What we are doing is to limit what we think the Court had in mind.

"A person having a claim for the creation of a usufruct."

Mr. Burling: I object to it if it also means striking out what Your Honor has written. Actually, if the other propositions of law are correct—

Mr. Boland: The only thought we had in mind, if Mr. Burling would bear with me, is that the finding is so broad it may also include the fact that after the usufruct was established and sale had been made to bona fide purchasers—whether or not it could still follow the proceeds. As I understand the law, the right of a person having a usufruct is to trace the assets from the gift in order to establish a usufruct and its results—in other words, the corpus of the res.

Mr. Burling: I don't understand the elements of what my friend is saying. I have no objection to his proposed language if Your Honor will add it rather than substitute it.

Mr. Boland: As long as you put "i.e."

The Court: That it is limited to the original?

Mr. Burling: I think my friend is confused as to the law. The record does not tell us when Fritz gave the key to Frankenberg which created or brought into being an in rem right. I do not know whether, in other words, Wilhelm and Marta von Opel were usufructuaries following the proceeds of the gift into Uebersee or whether they were persons having an in personam right of usufruct at the time that the agency was created, in which case they follow through a different path.

I submit that both propositions of law are correct and that one or the other is applicable, depending upon when the key was handed to Frankenberg. Therefore, the sim-

plest thing is to find both, since there is no dispute as
3114 to the correctness of both.

The Court: Is there any question about whether it applies to a double transfer? Could you say "from any proceeds from the sale"?

Mr. Burling: He did sell it to one person, and then they sold those securities and obtained still others.

Mr. Boland: No question of transfer; you could trace right through.

The Court: Then, your word "originally" might mislead there.

Mr. Boland: We used that word "originally" merely to connote the idea of transfer from one end to another, right through, so that you could establish usufruct at the time.

The Court: Cut out "originally" and then you are all right. "property covered by the claim." What is the difficulty about both going in? I don't know what we are trying to get.

Mr. Boland: The only thought I have in mind is the right of the person who claims establishment of usufruct to trace the proceeds before he establishes; but after it has been established, and particularly here, where you are dealing with bearer shares, the law is not such that it may be traced after it has been established. He has a personal claim against the individual; but query: as to whether the law is so clear as to how he may trace assets afterward.

3115 The Court: I don't remember any testimony on that.

Mr. Boland: I suppose probably it is academic.

Mr. Burling: I think it is.

Mr. Boland: Dr. Kronstein seemed to think it was very important.

Mr. Burling: I am perfectly willing that my friend's language be added.

The Court: Let us add that, then, and make both sides happy.

Mr. Boland: If you are going to add that, I would prefer to withdraw ours and leave yours unchanged.

Mr. Burling: I haven't any objection to that either, if Your Honor please.

The Court: All right.

Mr. Gallagher: Your Honor, I would like to take up at this point, rather than discuss findings 39 through 45, even though we do make some suggested changes in the tentative findings in accordance with your view on it—I would like at this time to bring to Your Honor's attention what to us is a very important point, and one in which we feel that the Court has inadvertently run into serious error. I mention that and would like to raise it with you at this time so that the question is not raised for the first time in the Court of Appeals.

You will recollect that the testimony of the ex-
3116 experts, both for the Government and for the plaintiff,

with respect to the establishment of usufruct was that copossession is a sine qua non. Until you have copossession, you don't have usufruct established as a right in rem. Your Honor is quite cognizant of that fact, as evidenced by your opinion and your findings, and in finding that the delivery of the key to Frankenberg constituted valid delivery and established a usufruct in rem. You state under one theory of German law voting rights go with the usufruct, but the res had taint, and hence the corporation is tainted.

Following out this understanding of the German law and the testimony of the experts both for the Government and the plaintiff, unless you have copossession or possession in your own hands or in the hands of your agent, you do not have a usufruct in rem. If you do not have a usufruct in rem, you are back to a usufruct in personam. You are where you have to again demand estab-

lishment of usufruct before even under that one theory of German law there would be any voting rights, hence control, hence taint. The record is quite clear. Mr. Burling throughout the record and in his cross examination evidenced no question about it: I am not discussing the sale of the shares in 1936. I am not taking issue with Mr. Burling whether it was, as we contend, a valid sale or tax evasion or sham sale. Let us say for the sake of this argument that I make no objection to what it would be called. But the simple fact is, as you have found the record in your findings up to this point. You found that sometime between 1932 and 1934 the key was given to Frankenberg, and that gave possession to the usufructuary's agent. An in rem right was established, and under at least one theory of German law you had voting rights.

Frankenberg has the key to that safe. The record clearly reflects that in 1936 those shares came out of that safe. They could come out only with the consent of the usufructuary's agent, Frankenberg, following your theory. They in turn were delivered to the Schweizerische Bankgesellschaft, as reflected by Plaintiff's Exhibit 78, for the account of Frima, which is Fritz—and there is no question raised in this case that Frima and Fritz are synonymous. Regardless of what kind of sale you call it, Frankenberg does not have his hands on those shares any longer, and they are bearer shares.

Mr. Burling in his summation went on to describe the fact that this was a bogus sale; that while those people were getting something von Opel retained the voting rights to those shares in the Schweizerische Bankgesellschaft physically.

Mr. Burling: The Bank in Baden.

Mr. Gallagher: I stand corrected on the bank. They are in the hands of another bank which is holding them on

behalf of 16 Swiss purchasers. And does the record
 3118 reflect that? They stayed over there all during the
 remaining '30s. Frankenberg comes to the United
 States in 1940. He is over here all during the so-called
 relevant times. "Relevant times," as I again want to stress
 to Your Honor, is simply from December 7, 1941, to the
 date of vesting. That is ~~one~~ relevant time. No other time
 is relevant; just those six or seven months. During those
 six or seven months Frankenberg is in ~~the~~ United States.

Frankenberg is in the United States all during 1941.
 But the record also stands uncontradicted that in November,
 1941, the shares are repurchased. By whom? By
 Frima, which is Fritz von Opel.

From November, 1941, to adopt Mr. Burling's argument
 of *continuendo*—we now use *continuendo* ourselves
 —from November, 1941, they are on deposit in the bank
 in Switzerland in the account of Frima, but not in Frank-
 enberg's possession.

The record is not too clear on the German or Swiss law
 with respect to how important that copossession is, other
 than the statement that copossession is a *sine qua non*.

We have discussed this at great length with Dr. Kauf-
 mann and Dr. Kronstein, and we will ask Your Honor to
 permit us, in the light of that record on bearer shares,
 and who votes those shares—only the person that has got

3119 possession—and without voting power—even fol-
 lowing out your opinion, from November, 1941,
 without having voting power in anybody other than
 Fritz—we say it is in Fritz; it is in nobody else. We have
 no control, even following your discussion of *taint*. So
 for that reason we would request the Court to permit us
 to re-open just for a sufficient length of time to take ad-
 ditional testimony from both Dr. Kronstein and Dr. Kauf-
 mann as to the laws of both Germany and Switzerland as
 to who votes bearer shares and as to what, secondly, be-
 cause it is the most important question in the control

feature, following your opinion, what happens to a usufruct in rem when possession is given up by the usufructuary or his agent. That is a secondary consideration. The other is the important part for purposes of this case or for the purpose of appeal or for Your Honor's decision in this case. But Plaintiff's Exhibits 78, 79, and 80 show the record to be completely uncontradicted that from November, 1941, onward, and particularly during our relevant time from the outbreak of war until the date of yestig, these shares were held in the bank in Switzerland for the account of Frima, and Frankenberg has no possession. Therefore, any control features rest with Fritz von Opel.

For that reason I would like to re-open and take additional testimony from Dr. Kronstein and Dr. Kaufmann in corroboration of the statement I have just made to you with respect to Swiss and German law, that 3120 the holder who physically has the possession, or the one for whose account are being held the bearer shares in Switzerland is the one who has the right to vote them.

The Court: Gentlemen, I think it would be a very serious mistake at this time to take additional testimony. It would start here a precedent that would be very, very serious. If I took your witnesses, I would have to take Mr. Burling's; and after having written an opinion and made findings of fact, if I let you come in on some other phase of it at this late hour, I am sure I would commit reversible error beyond any question. It would not be in the exercise of sound discretion. I think it would set a terrible precedent.

I frankly think, in my own judgment with regard to that whole matter, that that type of possession you are talking about is not what I would call possession. It is a power or custody proposition, unless there is something in this record that shows a passing out of the shares without any intent on the part of the beneficiary of the usu-

frust to give up his interest in it would constitute a divest of his interest. Unless you could establish that—

Mr. Gallagher: The experts would testify, Your Honor, and we would not contend that the usufructuary has given up his interest. We merely submit he would be in possession in personam, which was before it became in rem.

3121 The Court: Suppose I own a watch or I own an interest in some shares of stock. I say to you, "Here are bearer shares. You go out and get out of some taxes if you can, because I am going to keep my interest in this thing. I am going to control it ten years from now."

You say, "That is all right. I just want to go up there to have a transaction and get out of some taxes."

If I do that, I don't believe there could be any law to divest that interest.

Mr. Gallagher: I think Mr. Boland can clarify you on this phase.

Mr. Burling: May I speak for a moment?

The Court: Yes.

Mr. Burling: The matter can be solved very simply without any reference to German law. Plaintiff's Exhibit 80 shows that the shares on November 4, 1941, were delivered to Adler and Company. Adler and Company is the bank of Frankenberg. He has also been a director of the bank from 1931 to date and at various times has been managing director.

The record is bare of any evidence that the shares were ever taken out of Adler and Company from 1941 to this minute. So Frankenberg did have possession during what Mr. Clark says is relevant time.

3122 The Court: I have to find the facts that are here. Of course I will do that. If there is any correction of findings of fact, that is all right. But I think reopening of the testimony would establish a very bad precedent. I shall be glad to straighten out any mistake I have made in the proposed findings, but I could not, if there

is any opposition to it, receive any testimony that the mere handing over of custody to shares of stock with intention to keep interest in it would take away interest in the rem. I just can't understand it.

Mr. Gallagher: It would put you in a position where you could demand reconveyance.

Mr. Burling: I am compelled to object to it. I should like to state my final grounds.

The first ground is that it is not the law, that an expert would testify to, that once the in rem right is created, a usufruct is created. That is all the possession you have to have.

The Court: Until there comes a time that with your consent your interest is divested.

Mr. Burling: That is right. With physical possession of the bearer shares, it is not necessary to maintain an in rem usufruct.

The Court: If he used it without giving up his interest. That is the point. You have to give up your interest in the rem.

Mr. Burling: Second, the evidence is that the shares 3123 remained at all times subject to the control of Frankenberg. Frankenberg arranged this scheme—this tax-evasion scheme—and it ran through Adler and Company. The shares, I agree, were physically the custodial account of a bank; but before Frima could get them back they had to pass through Adler and Company. When the transaction was reversed in 1941, the shares physically went back to Adler and Company.

Mr. Boland: Mr. Burling has mentioned what he thinks the law is; I think I ought to be permitted to mention what we think the law is.

The Court: State what you expect to prove.

Mr. Boland: I think all the experts are in agreement, including Dr. Holstein, from the University of Frankfort. They all state, with respect to bearer shares, that the voting right, which is the main element of control, is lost when

possession is gone, even though usufruct has been established.

Under the terms of this agreement with the 16 Swiss bankers, as I understand it, Fritz had the right to buy the shares back at the purchase price paid to him. However, Fritz also had the opportunity, if he did not buy them back—and if he did not buy them back, the shares became the property of Fritz' bankers—but notwithstanding the fact they were bearer shares, the only way you can establish a right in rem is through possession. Once bearer shares are gone, the voting rights go with the bearer shares.

3124 Under the agreement, it is true that Fritz von Opel retained the right to vote them himself. So we have a factual situation of Fritz having taken these shares out of the deposit box, which created usufruct under your theory—taking them out necessarily with the consent of his father's agent—let us assume that—and putting them into the account for the 16 Swiss bankers under an agreement by which he—not Frankenberg—voted and retained voting rights. When these shares came back, they came back to Adler and Company through another bank, but they came back, as Defendant's Exhibit 80, to Frima Trust Establishment. They did not come back to the account of Frima or Fritz or Dr. Frankenberg. Dr. Frankenberg was over here, and there was no way under Swiss law or under German law that Frankenberg here in the United States, after the reconveyance of those shares back to the account of Frima, could have exercised voting control.

The Court: Suppose the owner of a usufruct interest in shares of stock told a co-owner he might take these shares out to operate "for your tax benefit, with the understanding, however, that I maintain my interest in them, and that my agent, Mr. Frankenberg, is going to control those stocks and control this corporation and its operations for years to come. No matter what the form of your transaction is, your custody, or what you do with it, I am going to 3125 keep that interest."

I would not believe under the law that he would

lose it any more than I would lose it if I told you you could use my watch for two or three days and then give it back to me.

Mr. Boland: Our experts state that the father would retain the right to re-establish usufruct. There is no question about that. He still has an in personam right. If there were such an agreement between the parties, perhaps the father would count upon the son or count upon the agent to make sure it would be re-established. But the record is absolutely devoid after these stocks came back on November 4, 1941—not only devoid of any showing of re-establishment, but, as a matter of fact, it seems to me—

The Court: You have shares of stock that simply evidence a right.

Mr. Boland: Bearer shares are a right in themselves.

The Court: No, they are evidences of a right. Your right is a right to part of your corporation's proceeds. It is not a tangible proposition like that. You can assign that by a separate instrument. He could have taken those shares of stock and written back at that time:

"Whereas I take the evidence of the right to the interest in there, I vouchsafe to you retention of your right, title, and interest in that corporation."

This is just a piece of paper; it is not like a watch.

3126 Mr. Boland: You have a gift under the usufructuary. Legal title is clearly in Fritz. Everybody admits that.

The Court: You make your offer of proof; I shall have to deny it. I just do not think I can reopen this case at this time. It would be a very serious thing. If I did that, lawyers would be after me to do it in every equity case I decided. I will have to exercise my discretion not to do that now on these findings of fact.

If there is anything in here that I have done wrong, or if I have gone beyond the record, I shall be glad to correct it. But I do not believe I can reopen the testimony.

Now, I shall have to go across the street. We have two

visiting judges here today, and I have to take them to our meeting. I think I can be back here by 2 o'clock. You be here promptly at 2. I think I will be on time. You be on time.

In the light of this, we will see if we can go through the rest of these quickly. Don't forget to have No. 31 written up, if you can, because I want to get rid of this today if I possibly can.

(At 12:25 p.m. a recess was taken until 2 p.m. of the same day.)

3127

AFTERNOON SESSION

(The hearing was resumed at 2 p.m., upon the expiration of the recess.)

Mr. Gallagher: Your Honor, with respect to finding No. 31, I believe you have the preliminary part, but if I may, I should like to state it again for the record. It reads, in effect:

"In October, November, and December, 1941, Transdanubia Bauxit, A. G. shipped bauxite to Germany. Transdanubia Bauxit, A. G. had entered into a contract with Giulini Brothers in Germany in 1940, providing for shipments up to and through the year 1942. However, in the spring of 1941" --

Do you want me just to dictate this to the reporter?

The Court: Have you agreed on it?

Mr. Burling: We have agreed on that, but it is not written down.

The Court: Why don't you just send it in to my secretary and let her type it and then bring it in in that form. Have her make a couple of copies.

Mr. Gallagher: It is pretty rough. I don't know whether she will be able to read it. I showed it to Mr. Burling. May I dictate it?

The Court: I want to turn over what I have to Mr. Burling to have it typed.

3128 Mr. Gallagher: May I be excused for 30 seconds?

The Court: Surely. Can the others carry on?

Mr. Gallagher: No, I don't believe so.

Mr. Burling: I have a statement to make which will take perhaps 15 seconds.

In relation to the motion to reopen, I might further protect the record by stating an additional ground. I further object to the reopening on the ground that the matter which is proposed to be inquired into is not newly discovered in any sense; it is additional testimony concerning the law of usufruct, which was fully explored during the trial.

The Court: All right. Can you read Mr. Gallagher's handwriting, Mr. Ingoldsby?

Mr. Ingoldsby: I can come pretty close to it.

The Court: Well, tell my secretary to make a rough copy of it; we can correct it if it is not correct.

Mr. Gallagher: That brings us to finding No. 39, I think, Your Honor. No. 39 as it now stands is to the effect that

"Hans Frankenberg was made managing director of Uebersee Finanz-Korporation in the spring of 1932 at the request of Wilhelm von Opel."

We have changed that in our proposed finding to the effect that it was at the father's suggestion.

You may recollect that early in the argument I 3129 raised the point that Defendant's Exhibit 8, which was the Gold affidavit, used the word "suggested." I pointed out to Your Honor at that time that the New York attorneys in their memorandum of law used the word "requested." The affidavit itself uses the word "suggested." We submit there is nothing else in the record to reflect that the father requested that Frankenberg be appointed managing director.

Mr. Burling: I freely concede that the word "suggest"

was used by Fritz in his affidavit and in the memorandum of law I think the record, however,—the entire record—and Your Honor's findings support the notion of request. Your Honor has found that Wilhelm von Opel had the usufruct to the property and that he wanted Frankenberg as his agent to safeguard his usufructuary interest. When he said, "I suggest"—assuming he used the words, "I suggest," to Fritz—even that would be a request. For example, if Your Honor were to say to me, "I suggest you sit down," that would be more than a request.

The Court: I do not think it makes very much difference. I will leave it as it is.

Mr. Gallagher: I might point out that the only record reference Mr. Burling set forth in his proposed findings of fact—if we are wrong, you can check us, Mr. Burling—was Defendant's Exhibit 8, the Gold affidavit. In their record reference in support of the word "request," we feel 3130 it should conform to their own citation.

The Court: "Request of Wilhelm von Opel in the form of a suggestion."

I will change it that way.

Mr. Gallagher: No, No. 40, as your tentative finding now is, reads that—

"Thereafter, Hans Frankenberg continued to be at all times and still is managing director of Uebersee Finanz-Korporation."

Our suggested change is:

"Thereafter, Hans Frankenberg continued to be managing director of Uebersee Finanz-Korporation, but between 1940 and 1945 Dr. Eugen Meier, president of the Corporation and a member of the Board of Administrators, acted as chief officer of the Corporation."

The Court: Why not just say that:

"Thereafter, Hans Frankenberg continued to be at all times and still is managing director of Uebersee. Between

1940 and 1945 Dr. Eugen Meier, president of the Korporation, acted as chief officer of the Korporation."

Mr. Gallagher: Exactly.

Mr. Burling: Meier started to be chief officer long before that in the technical sense that he was president of the board. There is no evidence that he ever acted or did anything. I think to make the finding "thereafter" would 3131 suggest there was some change in who was really director.

The Court: Yes, it would.

Mr. Gallagher: Mr. Burling himself, at page 2299 of the record, in questioning Mr. Meier, referring to the fact that Frankenberg had left, said:

"Did there ever come a time when you did have a direct hand in the management of the affairs of the Korporation?"

Meier answered:

"That became necessary when Mr. Frankenberg left in the year 1940, and we were left alone without connection with Fritz von Opel."

"Question. In other words, up until 1940, Frankenberg ran the company; isn't that true?"

"Up until 1940." This is Mr. Burling himself.

"Frankenberg ran the company; isn't that true?"

Meier: "Administratively speaking, yes. The technical and financial management was in the hands of Fritz von Opel."

At page 2266 of the record, Mr. Burling asked:

"Question. What action did you take as chief officer of Uebersee after that date with respect to this investment?"

Mr. Meier answered: "I have not taken any action. We had no means for engaging in transactions. I have 3132 not taken any action whatever."

There is not one line in this record, and there is not one exhibit in this record, which reflects that at any

time after 1940 Hans Frankenberg occupied any position with respect to the plaintiff corporation other than the fact that he was and remained a director of it.

The record is completely devoid of any testimony or exhibits that he in any wise engaged in the operations of American subsidiaries or that he in any wise engaged in the operations of the plaintiff company. The record does reflect conclusively that Meier was the man who from 1940 to 1945 did run the plaintiff corporation.

Mr. Burling: The record reflects no such thing. The record reflects that the last time anybody did anything with respect to assets—that is, securities—which are deposited, and which this suit is about—the last action anybody took that was testified to was when Frankenberg arrived in the United States from Europe and took Fritz down and "kicked the little master around until he straightened up the mess in Shreveport"; that is to say, the oil-producing companies which had their headquarters in Shreveport.

Mr. Gallagher: With respect to that, their own witness gave a different definition of the German word "vertrotten."

Mr. Burling: I believe there is some controversy as to whether the translation of the German is "worked on" or "kicked." At any rate, Frankenberg forced 3133 Fritz to do something in 1940. After that Meier's own testimony is he did not do anything. I do not understand how my friend can argue that Your Honor can find that Meier acted as chief officer when Meier testified he did not act at all.

I will concede that Meier was at all times from 1932 to date chief director, but I object to a finding that he acted after that date, because as long as anybody continued to act, Frankenberg was doing it.

There is a hiatus from the spring of 1940 to the spring of 1942; and after that we—the Custodian—had the property, and, of course, Frankenberg could not do anything.

Mr. Gallagher: But Meier could have acted with respect to it from 1940 to 1942.

With respect to the record, referring to page 2239, Mr. Burling asked Mr. Meier:

"Did there ever come a time when you did have a direct hand in the management of the affairs of the corporation?"

"Answer. That became necessary when Mr. Frankenberg left in the year 1940, and we were left alone without connection with Mr. Fritz von Opel."

With respect to the word "trotten," as to which Mr. Burling says there is some question whether it means "kicked," "worked on," or "persuaded," we submit 3134 that the definition that Mrs. von Opel gave—and she was their witness—is the definition that applies in this case.

I should like to remind Your Honor of the fact that in her testimony she stated quite arbitrarily that it was at her request that Frankenberg talked to Fritz about bailing himself out of the Shreveport set-up, where he had dropped over half a million dollars.

I am not standing too much on the technical ground that she is the Government's witness or the fact that she is Mr. von Opel's wife. Nevertheless, it is her testimony as to how it happened that Frankenberg had anything to say to von Opel and why she wrote what she did in that letter which came into evidence here.

Under those circumstances, and with the Meier testimony in here that from 1940 on, after Frankenberg left, we feel that the record warrants amplification of this finding to say that during the years 1940 to 1945 Meier acted as chief officer of the corporation.

Mr. Burling: That argument in no wise attacks the fact that Meier testified he did not act at all. If he did act at all, he did not act as chief officer of the corporation.

Mr. Gallagher: He was talking about Transdanubia at the time he said, "We took no action." But when Mr. Burling said:

"Did there ever come a time when you did have a direct hand in the management of the affairs of the corporation?"

Meier said:

"That became necessary"—

that he have a direct hand—"when Mr. Frankenberg left in the year 1940 . . ."

Those record references refer to the fact that he had said, "We did nothing about Transdanubia; merely left the shares in the safe; didn't do a thing about them; what could we do? What would you suggest, Mr. Burling?"

That is the same question we posed in closing arguments. Mr. Burling says just don't do business.

Mr. Burling: May I ask my friend to tell me the record reference where he says that the answer, "I didn't take any action," was limited to Transdanubia?

Mr. Gallagher: I might turn the question about, if I may. You give me the record reference where it says he took no action and I will point out the reference to Transdanubia.

Mr. Burling: I heard Mr. Gallagher read that just now. I can't find it.

Mr. Gallagher: That page is 2266. I am sorry.

"Question. What action did you take as the chief officer of Uebersee after that date with respect to this investment?"

"The Witness. I have not taken any action. We had 3136 no means for engaging in transactions. I have not taken any action whatever."

Mr. Burling: I again say that is ambiguous. There was no evidence that anything had been done in Switzerland after 1940, with the possible exception of the Transdanubia matter which we discussed. The remaining assets of the plaintiff corporation were a plantation in South Africa or in Tanganyika, and it was not Meier who misrepresented the status of the plaintiff or caused the status of the plaintiff to be misrepresented to the British authorities. Aside from that the remaining assets are all in this country, and Meier never acted with respect to them.

But if the question is whether Meier was titular chief officer of the corporation from 1932, I would have no objection. But this change in 1940, I think, is not in the record.

Mr. Gallagher: At page 2266 the Court said, when Mr. Burling was inquiring of Meier—the Court said to Mr. Burling:

"He has been asked by you about activities with Hungary since then."

"Mr. Burling. Would you read the question, Mr. Reporter, please?"

Then the question came:

"What action did you take as the chief officer of Uebersee after that date with respect to this investment?"

3137 "The Witness. I have not taken any action."

That was with respect to Transdanubia. But on the more general question of running Transdanubia, at page 2299, to again repeat:

"Question. Did there ever come a time when you did have a direct hand in the management of the affairs of the corporation?"

"Answer. That became necessary when Mr. Frankenberg left in the year 1940, and we were left alone without connection with Mr. Fritz von Opel."

The Court: "That became necessary" is a very vague term. I will just put in here:

"At all times from 1932 Dr. Meier, President of the corporation, was chief officer of the corporation."

Then, if your records show without any contradiction that he managed it, you can still have that in the case whether I find it or not.

When he says, "That became necessary," that is very vague. I do not know whether he was active or not. There

were a great many vague statements by some of these witnesses. I do not know the significance of that. If you want a formal finding that he actively governed and ran the affairs without any intervention by Frankenberg, I think I should have something a little more specific on it.

Mr. Gallagher: Don't you think Mr. Burling's 3138 question is pretty specific?

The Court: The way I would answer it, if I had to answer that, would be that "I was very active. I over-looked it. I spent hours having complete control over it." I would not say, "That became necessary"; it is so vague.

Mr. Gallagher: Meier did not talk in English; his Swiss was translated by Mr. Laufer. I don't know that that was—

The Court: I will find that he was president and was chief officer at all times from 1932: If your record supports that without my finding it, you can still get it in; if it does not, you can argue on the record. It does not seem to me that there was a very clear-cut issue on that as to which I could make a finding.

Mr. Gallagher: I might submit, without laboring the point, that there is certainly nothing in the record to reflect that Frankenberg or von Opel had anything to do with the corporation.

The Court: I have some recollection that Frankenberg had some communications after that.

Mr. Gallagher: No, sir. I can assure you the record is silent.

Mr. Burling: So far as I can recall, the last evidence relates to Shreveport.

The Court: And that was in 1940?

Mr. Gallagher: Yes, Your Honor.

3139 Mr. Burling: I may say, Your Honor, that the principal assets of the corporation were not disturbed at all by anybody. That is, so far as the record shows, nobody did anything about the management part of the brewery, and nobody did anything about the management of Spur.

Mr. Gallagher: I might submit that nothing was done with the assets from the time Fritz von Opel purchased the companies.

The Court: If there is any contradiction, you can argue it.

"At all times from 1932 Dr. Meier, President of the Corporation, was chief officer of the Corporation. Dr. Meier testified"

so and so. You can copy that word for word when you see what it is.

Mr. Gallagher: All right.

Mr. Burling: Frankenberg did testify that after the hostilities were over, he personally selected the documents in Switzerland to be brought here for use of counsel.

Mr. Gallagher: We will agree with that. That was in 1947. He was back in Switzerland, and we requested that he get the books.

The Court: You can copy that part of the record in. I do not want to make a formal finding on what the significance of that is, because it was never in issue.

3140 Mr. Gallagher: How does your finding read, Your Honor?

The Court: "At all times from 1932 Dr. Eugen Meier, President of the Corporation, was chief officer of the Corporation. Dr. Meier testified that—"

Mr. Gallagher: Do you want me to give this language to your secretary to be typed—"Dr. Meier testified that"?

The Court: You had better give that to her so that I can paste it in here. I want to give it to Mr. Burling when I get through and let him have it typed up.

Mr. Gallagher: " * * * testified as follows: Record page 2299:

"Question: Did there ever come a time when you did have a direct hand in the management of the affairs of the corporation?"

The Court: Just give that to her; she will write it up. I want to paste it in here, so that he can copy it from

this. That is finding No. 40. I have the first part of it. Just say:

"Dr. Meier testified as follows:"

Then copy that.

Now, finding No. 44.

Mr. Gallagher: Your Honor, I might state with respect to finding No. 44 that I have a few general remarks that I should like to make to you and bring to your attention which apply also to findings Nos. 41 and 43, if 3141 you will look at those for just a moment before I continue.

The Court: I have those handy; I can follow you, I think.

Mr. Gallagher: In finding No. 41 you said:

"Hans Frankenberg acted at all relevant times as managing director of Uebersee Finanz-Korporation as agent for Wilhelm von Opel."

Finding No. 43 reads:

"Hans Frankenberg, as such agent, from the spring of 1932 until the date of vesting, exercised control over the investments and activities of Uebersee-Finanz-Korporation."

Then, finding No. 44 reads:

"Fritz von Opel, from time to time, from the spring of 1932 until the date of vesting, engaged in activities in behalf of Uebersee-Finanz-Korporation and gave instructions concerning its investments."

Those three can basically be more or less lumped together, as we see it. This is the point I want to stress a little more than the remaining ones. I do not think it is going to take too much time. I should like to recall to your recollection what the record is with respect to these invest-

ments and who made them, who gave directions, who controlled them, and who controlled the activities.

First of all, I won't labor as to what Frankenberg 3142 had to say; I know you will recollect what he said.

He said, "Fritz did the investing, and I gave him banking advice."

As Mr. Meier said, at page 2262, Fritz von Opel always controlled and directed the investments and policy of the Uebersee-Finanz Korporation. At page 2272 he said:

"Moreover, as I stated before, the policies as to investment and business transactions issued from Mr. Fritz von Opel."

At page 2299:

"The technical and financial management was in the hands of Fritz von Opel."

Next, as to Mr. Adolph Gaeng, one of the directors, as to his affidavit it is stated:

"It is stipulated that he knows of his own knowledge that Fritz von Opel controlled the policies and operation of Uebersee-Finanz Korporation."

Mr. Burling: Did counsel use the word "stipulated"?

Mr. Gallagher: It was stipulated that that would have been his testimony if he had testified.

Mr. Burling: That certainly is not what happened.

Mr. Gallagher: I think the Court recollects. Von Opel himself goes into great length in testifying he carried on the investments.

Now, we get down to a few more pointed factors, one of which, because of the nature of whose witnesses 3143 they are, might lend more weight to their testimony than perhaps the testimony of Plaintiff's witnesses.

First of all, Mr. Hoffacker, you will recollect. I am reading from his affidavit in Defendant's Exhibit 8, just to refresh your recollection about that.

"My only communications, written or oral, regarding investments, * * * were with Fritz von Opel."

Then he says, folio 210, taken orally, May and June, 1932:

"I discussed with Mr. von Opel investments to be made in this country."

He goes on with the discussions. He finally got orders from Fritz; as a result Spur, Harvard, and so forth, were bought.

Folio 218, October, 1931. There is the recommendation to buy stock from Burden, Cole, and the making of an offer of \$5 for the purchase of 50,000 shares.

That is his testimony as to whose agent he was. His affidavit states categorically that at the time when they did that questioning, he was agent. He said he was Fritz von Opel's agent and aided and gave him advice in his investments.

Now we get to Crittenden. What does Crittenden say about these American companies and who controlled the investments and policies?

Page 1897 of the record:

3144. "Did Mr. Hoffacker make any reference to the source of the funds he referred to?"

"Answer. Yes."

"Question. What did he say?"

"Answer. He said that he was agent for and adviser to Fritz von Opel, the son of Opel, the automobile manufacturer in Germany, who had sold that company to General Motors."

That was Mr. Crittenden saying that.

Page 1899. Hoffacker.

"* * * described * * * that he was an agent"—this is Crittenden's testimony—"for Fritz von Opel and guided him solely in all of his investments in the United States."

That is out of Mr. Crittenden's mouth here.

At page 1942 of the record, Crittenden again states:

"Question. Regarding your first meeting with Hoffacker, with relation to Mr. von Opel, I believe it was your testimony on direct examination that Hoffacker told you that he was an adviser, an agent, of Fritz von Opel; is that correct?"

"Answer. Yes."

"Question. And it is your further testimony that he never deviated from that statement; is that correct?"

"Answer. Never."

Now, page 1909. What does he have to say there?
3145 He was asked if he recalled what Hoffacker said when he introduced Mr. Frankenberg to him. That was in Montreal.

"Answer. Why, he explained to us that Dr. Frankenberg had assisted or was a representative of Fritz von Opel and knew his father in many ways."

That is all Crittenden.

Let us go to Mr. Houghland himself. We have this record that Crittenden himself—one of the Government witnesses—now states that Hoffacker was von Opel's agent; that Hoffacker was influencing investments and policies.

Mr. Burling: If Your Honor please, counsel omitted to read that Mr. Crittenden said Hoffacker described the very Opel Motor Works in Germany intrusted to the son by the owner. That is at page 1899 of the record.

Mr. Gallagher: You can read any part I have omitted, Mr. Burling, when I get finished. I am reading the excerpts we have here.

Bear in mind that the Hoffacker affidavit is in evidence, offered by the Government as part of Defendant's Exhibit 8.

Houghland, at page 1852 of the record, says:

“Question. And on many occasions since 1932 you have followed the instructions of Mr. Fritz von Opel, have you not?”

“Answer. Very, very few occasions. I can’t recall any instructions from Mr. Fritz von Opel, although it is perfectly possible that there were. I followed the instructions of Mr. Theodore Hoffacker.”

He does not say anything about Frankenberg; it is Hoffacker.

At page 1854 of the record, the same Mr. Houghland testifying, the question was asked:

“He”

meaning Fritz von Opel—“gave you a completely free hand, didn’t he?”

“Answer. Somebody did, after some period of turmoil. After the company was shown to be profitable and, I hope, well managed, why, there wasn’t much interference in later years, particularly after Mr. Hoffacker got out. Mr. Hoffacker occupied a very dominant position as a man giving me instructions.”

Having shown the place that Hoffacker occupies in here by Fritz von Opel’s statement—by his own statement—and by Crittenden’s statement of Hoffacker being the man controlling the investments and suggesting to Fritz where to invest, and with Houghland himself stating that Hoffacker is the man giving him orders, we submit that the finding that Frankenberg was controlling the investments—and there is not one line in the record that he is controlling those investments, other than the story about getting Fritz to bail himself out of the Shreveport jail

3147—as a matter of fact, the only two conversations that have really linked Frankenberg at all with this picture, even according to the Government’s theory, are with respect to Zurich in 1937 and with respect to New

York in 1937, a talk with Houghland on one occasion, and on the other with Crittenden, and in each instance they were asked for money for different ventures. Houghland was not asked for money for the Spur Company. Crittenden was not asked for money for Oil Production, Incorporated.

The Court: There was some testimony by Houghland that there came a time when he did seek freedom with regard to Spur.

Mr. Burling: With regard to setting up another set-up.

The Court: And then Fritz von Opel telephoned him, I think, that he would like to go along with him and agree with him, but that Frankenberg would not permit it.

Mr. Gallagher: That was generally after that. That involved new capital.

The Court: That is right; new capital.

Mr. Gallagher: That was a different venture. That was not Spur. That was not one of the subsidiary corporations.

The Court: That is a circumstance. The one I am talking about is No. 44.

Mr. Gallagher: I am taking 41, 43, and 44 all together. No. 44 has to do with Fritz being engaged in activities on behalf of Uebersee. Our suggested finding on 44 is:

3148 "Fritz von Opel continuously from the spring of 1932 until the date of vesting, acting under a full power of attorney from the officers of the plaintiff corporation, engaged in activities of the plaintiff corporation and gave instructions for its investments."

The Court: Do you want No. 41 changed?

Mr. Gallagher: We feel as to No. 41 that there is nothing to support the relevant times phase, which is the period of the outbreak of the war until the time of vesting, to reflect that Frankenberg was acting as Wilhelm's agent during that period of time.

Then, No. 43 says that:

" * * * from the spring of 1932 until the date of vesting," Frankenberg "exercised control over the investments and activities of Uebersee-Finanz Korporation."

The investments are these American corporations whose stock has been seized.

Finally, the record is completely barren of any instructions he was giving the corporations or any actions he was taking with respect to the investments during the relevant time from December 7, 1941, until the time of vesting. He could have given five thousand orders in 1933.

The Court: Well, you see, I have a little different viewpoint. You are speaking of a technical view in that regard. He gave instructions previous to the time you are talking about, and unless there was some evidence of cutting off precipitately it is logical to draw the conclusion—it is reasonable to draw the conclusion—that he would continue that. I had definitely in mind this Frankenberg situation gave me the impression or gave me the belief—that if any major conflict or problem would occur, he would be the guiding genius. He might not have to act very often.

Mr. Gallagher: Frankenberg came to this country in 1940, applied for American citizenship in 1941, and became an American citizen.

The Court: Of course, I am not dealing with that; I am dealing with what he did for Wilhelm.

Mr. Gallagher: I am talking about the relevant period of December, 1941, until the date of vesting in 1942. Under the conclusion you are arriving at, with nothing affirmative shown in the record whatsoever, you would make Frankenberg an enemy agent, acting on behalf of the enemy; during the period of the war, at a time when the man has an appli-

cation pending for United States citizenship, which is granted to him. I think it becomes, when you keep in mind that factor, somewhat illogical.

The Court: Do you want to say he acted as agent up to the outbreak of the war—is that it?—instead of to the date of vesting?

3150 Mr. Gallagher: There is no evidence whatsoever that he was acting in any agency when, even following Your Honor's tentative conclusion, after 1940—not 1941, but after 1940—there is not a thing in this record—

The Court: Here is what I am getting at. If I know that Mr. Fairless is president of United States Steel and carries on up to a certain time, and we haven't any word to the contrary or any action to the contrary—that he acted right along—do we stop right at the very moment with respect to which evidence stops? In other words, if a man has been engaged in an activity over years, and then you stop with a piece of testimony as of a certain date in 1940, does that mean, because the testimony stops at that date, your deduction stops at that date?

Mr. Gallagher: I think with respect to that the Government has the burden of proof of carrying it. It was during the relevant time period that something was done with plaintiff corporation or with the subsidiary corporations. Were the Americans being watched? Was there anything in this country that could be used to hurt us?

The Court: What I am getting at is that when a situation is established and it runs over a number of years, does the mere fact that the testimony with regard to it stops at a certain date mean that the Court could not draw the conclusion that it continued?

3151. Mr. Gallagher: No. I think we do not have a Trading-With-The-Enemy Act until the date war is declared.

The Court: I understand.

Mr. Gallagher: The burden is on the Government.

The Court: To make a homespun expression: I have been devoted to my family for years. Everybody knows it. The last time I made any overt act of expression was on December 25. Now, does the devotion stop there? Is there a presumption that it stops? Or, don't you have to show that it stops? That is what I am getting at. They don't have to come in here and show that control exists over a long, continuous, unabated period of time; that the burden is on them to keep showing that afterward. It may be after 1941, when he is an American citizen, he is pretty quiet about it.

Mr. Gallagher: I do not think a man who is going to apply for American citizenship is going to commit any overt act on behalf of an enemy.

The Court: He is going to be careful.

Mr. Gallagher: I think you are finding he is acting on behalf of an enemy after he has an application in to become an American citizen, with not one thing in the record to show any action with the subsidiary corporations or with the plaintiff corporation.

The Court: I will give you a chance to be heard, Mr. Burling, before I make up my mind. Maybe we could say:

3152 "From the inception of this firm down until 1940 Frankenberg handled in behalf of Wilhelm all the affairs, and all the evidence with regard to continuation is nil. However, there is no evidence showing that there was a cessation of it."

Mr. Gallagher: That would be satisfactory with the plaintiff.

Mr. Burling: Since we run the risk—I personally think the chance of reversal is negligible—I hope—but since we run the risk, I think the proposal makes that risk greater rather than less. In other words, I think it would be helpful if Your Honor would draw an inference of fact.

The Court: I shall. I can do it that way. In other words:

"I find from the facts that Frankenberg at the beginning of this transaction, as of the time the shares were deposited with him and the key was turned over to him—from that time down until 1940, continuously acted as agent of Wilhelm von Opel in the directing of all major policies of the corporation by reason of that last act being in 1940; that he continued to do it to the time of seizure."

If it is illogical and unreasonable, then the Court of Appeals can say this conclusion of facts is silly. But that is my conclusion.

3153 Mr. Burling: We have no objection.

Mr. Gallagher: You mean by that you draw the inference?

The Court: No, I make the finding.

Mr. Gallagher: That he was the agent from the time of the key until 1940, is what you said; is that correct?

The Court: No; I say from the facts or from the evidence adduced—that is what it really is—that beginning as of the time of turning over the key and continuously through 1940 the evidence shows he exercised the major control with respect to the policies in behalf of Wilhelm von Opel, in behalf of the policies of Uebersee and the purchase of securities, and the like; and there being no evidence with regard to the matter from 1940, the Court finds as a fact that he continued to do so.

Mr. Gallagher: That is all right.

The Court: In other words, I am perfectly willing to have the Court of Appeals know, Mr. Gallagher, that I did not make my findings of fact on any piece of evidence that occurred after 1940. I will grant you that consideration. But I must say that my own judgment is, when an agent of that importance goes on for all that period of time, making major decisions of policy, that he did not stop

instantly, unless you show he did—unless you have some glaring evidence that he did. I do not want to go into the facts of the matter to any extent. I was very firmly 3154 convinced of Frankenberg's agency on behalf of the father. He did not answer the questions of Mr. Burling directly on that very point. He hemmed and hawed about it. I marked it down in my notes every minute he did it. It was the very heart of the case. Here is a brilliant man—an adviser. He was asked a question, and he did not answer it directly. Any man as brilliant as he, knowing all the facts, would have answered immediately. But every time we got around to Frankenberg's agency, there was some evasiveness about it. The evidence was too strong—just overwhelming, in my judgment—on that point.

Well, you have my idea about it.

Mr. Gallagher: Will that be substituted, then, for finding—that would be finding 43, as I would read it.

The Court: I think that is all right.

Mr. Burling, will you rewrite that in the light of my statement? I stated it very loosely, but you get the point.

Mr. Burling: I think so.

The Court: I want to let the Court of Appeals know that I acted on evidence that the agency ended in 1940, but that the continuendo of that control over that long period of time, of probably six or eight years, indicated to my mind that it kept on and continued, in the absence of some very powerful evidence to the contrary, which I did not feel was produced in this case.

Mr. Gallagher: All we are asking basically in 3155 finding No. 44—the only change in No. 44 basically—is that we want in there that Fritz was acting under a full power of attorney from the corporation. I do not know whether Mr. Burling has any objection.

Mr. Burling: Yes, I object on the ground that it is contrary to the record. Fritz acted at least up until the Gold Case affidavit intermittently under a power of attorney.

Furthermore, according to Dr. Meier's testimony, he was kept completely away from the management of the company, at least up until the Gold Case.

The Court: Whatever the record shows, if it was intermittently.

Mr. Boland: And thereafter continuously.

"Fritz von Opel, from time to time until 1935, and thereafter continuously until the date of vesting."

Mr. Burling: They would have Your Honor find Fritz von Opel continuously from the spring of 1932 acting under a full power of attorney, and so on. That is directly contrary to the evidence. They are still going directly contrary to what the theory of the Gold Case was.

Mr. Boland: Do you object to "after 1935"—stating that he acted continuously?

Mr. Gallagher: "Continuously" merely means that this power of attorney was outstanding at all times from the spring of 1932.

Mr. Burling: I do not believe the plaintiff corporation should ask your Honor to find as a fact something directly contrary to what the plaintiff corporation swore to in the Supreme Court.

The Court: No, I am not going to do that if it is contrary. Is it contrary?

Mr. Gallagher: I do not think it is contrary. Furthermore, it is a peculiar remark of Mr. Burling's, under the circumstances.

We would like you to find that what Hoffacker said in the Gold Case was true also.

Mr. Burling: What Hoffacker said in the Gold Case does not estop the Government of the United States.

The Court: I don't know whether it is estoppel; but what is the issue here? What do you want the power of attorney to do?

Mr. Gallagher: We want merely to show that under a

full power of attorney he acted continuously from the spring of 1932, which he did. It is in the Gold Case that he had this power of attorney.

The Court: I will find anything he said. There is no conflict on that.

Mr. Burling: The relevancy of this relates to the next finding. My friend is trying to erode Your Honor's finding that the management was ultimately in Frankenberg's hands.

The Court: Do you admit that from time to time 3157 he had powers of attorney until 1935?

Mr. Burling: Yes.

The Court: And that after 1935 it was continuous?

Mr. Burling: I don't know whether it was continuous or not. I frankly can't state. If my friend can show it to you in the record, I may. I know it was discontinuous prior to 1935.

Mr. Gallagher: Our record references are Plaintiff's Exhibit 74 and pages 639, 2308, 2309, 2468, and 2469.

Mr. Burling: I can't check those references that fast, Your Honor. My friend referred to Plaintiff's Exhibit 74, which is a power of attorney made out in 1932, which expired, in accordance with the affidavits of Meier and von Opel, filed in the Gold Case. It does not establish a continuous power of attorney, but quite the opposite.

Mr. Gallagher: Let us drop it and leave it as the Court found it before.

Our next one is No. 45. Counsel for the plaintiff had moved that this be stricken. However, in the light of your new finding on 43, that very much covers it, except that, at least, to be in accord with your finding No. 43, with the record testimony, and with your theory of the case, we still feel should read:

"carried on with the guidance and direction of Hans Frankenberg, agent of Wilhelm."

3158 There isn't anything in the record to indicate that Wilhelm ever gave him any orders.

The Court: I understand your point on that. I started at one time to write in my opinion a great many reasons why I reached this conclusion. It would not be very helpful. If I started giving reasons, it would be just like a jury coming out and saying, "We find this because of this, that, and the other." It is bad practice. I can assure you I gave that matter very careful study, and I reached this conclusion. I am going to leave No. 45 as it is.

What is No. 49?

Mr. Gallagher: In No. 49 we are changing the fact. In your finding you say a usufruct was created by the gift agreement, while, as a matter of fact, the affidavit stated that a usufruct had been created pursuant to the gift agreement.

The Court: This is not what I say; it is what Fritz von Opel said. Did he say it had been created by an agreement?

Mr. Gallagher: "Created pursuant to," is what he stated in the Gold affidavit.

The Court: Is that all right, Mr. Burling?

Mr. Gallagher: That is the theory of their case.

Mr. Burling: I don't see the relevancy of it, but I don't care.

Mr. Gallagher: Just one other addition, and that 3159 is at the end, where you said:

" * * * and he further stated he had bare legal title."

If we ask you to add:

" * * * plus 20 percent of the income."

He also stated that in the affidavit, and you are talking about what is stated in the affidavit.

The Court: That is right; there isn't any question about that.

Mr. Gallagher: So "plus 20 percent of the income" is what is in the affidavit.

The Court: That is not going to hurt it.

Mr. Boland: In No. 51, the only point we have is the fact that insofar as usufruct had been established and waived, we do not think it is in conflict at all with the theory of the Gold Case. Our position is that the usufruct, if the usufruct had been established and waived, is not in conflict with the theory of the Gold Case. The waiver came subsequent to it. So our proposed finding is insofar as there was usufruct established.

Mr. Burling: That statement is clearly not supported by the record. The only two people who testified that there was waiver were Fritz and Dr. Gros, and they said the waiver conversation took place in the midsummer or autumn of 1935, as these Gold cases went on up through the Second Circuit.

The Court: Mr. Burling, there isn't any doubt on 3160 earth but that you are entitled to a finding, and I will make it just as plain as it can be. It is utterly inconceivable to me that Wilhelm von Opel, with the case pending in the United States, would have waived his interest so that he would have lost it. I just can't believe it. He is so smart. All of them are. I don't know that this, however, is much of a finding of fact, if you want to strike it out.

Mr. Burling: I would like to have it in as is.

The Court: If the Court of Appeals finds it inconsistent, I don't know what they will find. You can argue that in the Court of Appeals without my finding it. I am inclined to have it come out. I think I will strike it out. That is really not a finding of fact. I will strike it out entirely.

Now, I simply can't believe that he would have waived his right, in finding 52.

Mr. Gallagher: We say, Your Honor, that the mere finding you make that in 1935 waiver was discussed but never abandoned left us with four or five different bases upon

which it could have been. We were not sure whether it was because of foreign currency regulations or because the agreement was invalid—

The Court: I just think he didn't waive it. He talked it over with Dr. Gros. Here was one of the major things he was trying to accomplish in this country—the getting of that gold over to Germany. The argument that your side used was that he just didn't want to be bothered with 3161 this thing any more. He didn't want to be bothered with it—with this usufruct. He wanted to get rid of it in this form. That is one side.

The other side is that they made formal waiver of that, which would defeat every possible chance of his getting the gold which was over here, which he had been trying to do for years. He simply wouldn't do it. Goodness knows, these people are not stupid people; they are smart people.

Mr. Boland: Our position has always been that the father knew nothing about this Gold Case. I think that is clearly evident from the fact that these letters were written to the German Government. They were introduced in the Gold Case. He was claiming he had no rights, in any manner, semblance, or form, under this gift agreement. It is completely inconsistent with the whole theory of the Gold Case.

The Court: He claimed he had no rights!

Mr. Boland: He claimed he did not want any and that he was completely finished with them. The first letter was written October 5, 1935, at the time this Gold Case was going on. It was written to the German Government—and letter after letter was written to the German Government. He has taken a position which is absolutely contrary to the whole theory of the Gold Case.

The Court: That is not what I say.

Mr. Boland: I do not see how it is such a far step 3162 to say that he is going to waive all the rights he has when he is telling the German Government in open public that he does not have anything and he does not want anything.

The Court: What was his motive in getting rid of that?

Mr. Boland: His motive in getting rid of that was simply and solely this: that because the gift agreement of 1931—because of the extreme desire of the German Government to get foreign credits, which is what they wanted—and I think the record is quite clear they were after every nickel of foreign credit they could get—they were after Wilhelm von Opel either to establish a usufruct to bring this back or to upset the agreement, to get all those foreign credits here in the United States. After all, there was \$4,000,000 worth of foreign credits tied up here that Fritz von Opel had slipped out from the German Government. They wanted that back, and he was fined in connection with this.

The Court: Yes.

Mr. Boland: Therefore, after this thing was over—the father's fine—his main object—and it is clear from the letters what they were trying to do was to convince the German Government that nothing more—that the father didn't want to have anything more to do with this. He never claimed he had any rights; if he had them, he didn't want them.

The Court: Let us see, now. If he had won his Gold Case, he would have taken the gold into Germany, wouldn't 3163 he?

Mr. Boland: Oh, no.

The Court: Where would it have gone?

Mr. Boland: It would have gone to Switzerland.

The Court: Oh, yes; of course. He would not have taken it directly to Germany. It would have been involved in the claim of the German Government, which wanted to get it.

Mr. Boland: If the usufruct had been established, they would have been right in there for it. As a matter of fact, he would have been subject to death in 1937 or 1938 for not having reported his interest and his rights in this usufruct. He never reported it, and they gave him plenty of

time for immunity or amnesty statutes. They put through amnesty statute after amnesty statute.

"All right. We will let bygones be bygones. But if you report it now, we will forget it."

Never once did he report that he had an interest.

Mr. Burling: None of the reports here in the record—

Mr. Boland: The Judge asked me what my theory is.

In 1935 he is writing to the German Government, stating his position, which is absolutely contradictory of the theory of the Gold Case. So is it a far step to say he is willing to forget it forever; he does not want it?

The Court: The only argument I heard you make on that waiver—and I listened to it very carefully, because I asked you to argue that—the only argument I heard made on that was that he wanted to get out of this; he just 3164 wanted to wash his hands; he had an oral agreement to waive it. As you say, that is directly contrary to this suit here in America. What is the evidence that he did not know about this suit?

Mr. Boland: Well, we have Fritz' statement that he did not tell him anything about the agency until he went back there. We have the father's statement that when he was asked by Fritz whether he wanted to ratify and set up a usufruct, he said no, he didn't want to have anything to do with it.

The Court: I am talking about this suit in New York. What is the evidence that Wilhelm did not have any knowledge of it?

Mr. Boland: The father's statement, himself; Fritz' statement—

Mr. Burling: May I ask for the record reference as to where Wilhelm said he had no knowledge?

Mr. Boland: Specifically, he did not state that he did not have any knowledge. The question was never asked of him.

The Court: If I did not make this finding, I think probably I would be reversed in a minute. If the evidence does not support it, I would have to grant you a rehearing.

Mr. Gallagher: In that connection, I might say I am premature at the moment, because we do not have an affidavit to support it—we are going to ask your indulgence, before any judgment can be entered, to move for a rehearing on the ground of newly discovered evidence.

3165 The Court: I am afraid I shall have to make my finding and then let you do it. If you want to make a motion for rehearing on newly discovered evidence, I will let you do it, but I have to act in an orderly way on it.

I think I will hear Mr. Burling on this.

Mr. Gallagher: There is just one additional point which has a bearing on this. You will recall Mr. Burling had Mr. von Opel on the stand on cross-examination and asked him whether or not he had told Dr. Gros about the Gold Case. Dr. Gros himself testified, I believe, that he was unaware of the Gold Case and that Fritz von Opel had not told him. Fritz testified he had not told Dr. Gros about it.

The Court: Did Frankenberg have an affidavit in connection with this?

Mr. Burling: I do not have a copy of the affidavit, but Fritz' affidavit was sent to him in 1935.

Mr. Gallagher: That is not in the record, is it?

Mr. Burling: Yes, that is in the record.

The Court: Let me hear from you, Mr. Burling. This goes right to the heart of the case. I felt pretty positive about it. I am trying to refresh my recollection on it.

Mr. Burling: I did not realize we were going to have a reargument.

The Court: No, neither did I. I want to get it back in my mind.

3166 Isn't it correct that Gros testified—he brought into the testimony some letters, as I remember it. Then, the testimony of some of them was that there was an oral waiver.

Just as Mr. Boland says, it seems to me, in the first place, unusual that the man who had held control over this usufruct for such a long period of time should give up that large sum of money at that period; secondly, it is beyond belief that he would do it with this case pending over here for it would absolutely ruin this case and ruin something, that has been fought for.

I had not the slightest idea that Wilhelm von Opel had not known about this Gold case; I thought the evidence was pretty strong that he had.

Mr. Burling: I did not know of any that he did not, but there are other pieces of evidence indicating nonwaiver, which Your Honor also recalls. To me, one of the most persuasive ones is that the two people who could do the waiving—that is, Wilhelm and Marta—were both examined on depositions, and my friends omitted entirely to ask them anything about the waiver.

The Court: Yes, I remember.

Gentlemen, I think I shall have to find it. That is the heart of what I found.

Mr. Boland: If the basis for this finding that there was no waiver is solely on the one fact that the question 3167 was not asked of the mother or father—

The Court: No, that is not solely the thing. You certainly have a great many things. In the first place, here you have writings and you have steps which deal with tremendous interests, and pains taken to support them; and then in a most informal way you find some ~~oral~~ agreement being set up to waive it. That is a very striking circumstance. There is a lot of money involved. As you say, it would defeat this case in the United States if it were known. In the absence of very powerful testimony showing that Wilhelm did not know about this case, I would certainly think he knew about it. How could that go on—all that tremendous activity go on—without his knowing about it, unless somebody testified he had no idea about it, and it was very clear?

Mr. Boland: Your Honor, is it reasonable? Here is the mental hurdle we have all had in respect of your finding: Is it reasonable to assume that a man who had gone through what Wilhelm von Opel went through in respect of this gift agreement—criminal proceeding where he was threatened with prosecution, threatened with everything, and finally fined a very sizeable amount of money—a man who is independently wealthy—is it reasonable to assume that at the time, the very time—when he is being fined in Germany, he would permit, through his agents, a suit to be filed in a United States court which states that he 3168 has a usufruct, when he has been arguing to the German Government that he has not?

The Court: When he is fined at the behest of Hitler, he can do almost anything.

Mr. Burling: Furthermore, I have here an exhibit which shows he reported use of a usufruct.

Mr. Boland: A tentative usufruct, which makes an in personam claim.

The Court: I gave this question of waiver very careful thought and asked you to argue it. I did make this finding. I am as firmly convinced he did not do it as you are that he did, Mr. Boland. Unfortunately for you, I have one view. If I thought he had orally waived it, I would have had to find in your favor.

Mr. Boland: You had no question in your mind that those letters were written to and discussed with the German Government and that Director Wilhelm testified Gros did come.

The Court: The fact of waiver is just as astounding to me as the writing of letters.

Mr. Burling: Most of the letters were in 1937. This is in 1937. That is another piece of evidence, I think, that sustains your Honor's finding. The purported oral waiver was in 1935. Yet Gros prepares a letter in 1937, two years later, in which he says the parties intend to waive, not that they have waived.

Mr. Boland: The significance—and I think it is very important—is that at the time they agreed to waive 3169—we take this position—their waiving was a waiver or certainly—and this has always been our position—certainly by 1937, when Director Wilhelm told them then he could not take any action—then at that time a waiver becomes effective. It is certainly not reasonable to assume they would publish an agreement to waive during a time when they were negotiating with the German Government to find out what was going to happen to them if they did waive.

The Court: If your weight of the evidence is overwhelming, you can reverse it. That is my conclusion.

Mr. Boland: Our request is for additional findings.

The Court: Where are you?

Mr. Boland: We are at finding 52. We have a separate request for more specific findings.

Mr. Ingoldsby: May I point out one document in evidence which I believe has been overlooked? I speak of a letter of August 2, 1935, which Fritz von Opel wrote to Dr. Gros. That was the one in which he discussed with Dr. Gros the question of waiver. He spent pretty nearly a whole afternoon on the witness stand squirming because he had failed to state in that letter to Dr. Gros anything about the statement that the usufruct was established, as stated in the Gold Case.

The Court: Mr. Boland, what is it you want made more specific?

Mr. Boland: We now know the basis of Your 3170 Honor's findings, and it may help clarify it if it were agreed on appeal that it would be limited to that basis. I don't know whether you found the agreement was insufficient under German law or whether it was due to the foreign currency regulations.

The Court: No; I thought I made it perfectly plain that it was in fact made.

Mr. Boland: That is the only thought I had.

The Court: In other words, I do not think Wilhelm ever said orally or otherwise, "I hereby waive any interest of whatsoever kind I have in this property." I don't think he said that.

Mr. Boland: As long as it is clearly understood as to what the basis is.

The Court: "was never waived or abandoned by any statement or act"—I will say that—"by any statement or act."

Mr. Boland: As long as we have the basis, that is all we need.

The Court: What I say here won't go in the Court of Appeals. I will write in here:

" * * * by any statement or act of Wilhelm or Marta."

I will amend it that way, if that will help you some. I was not undertaking to say, in other words, if that is what you wanted me to say, that under the German law it could not be orally waived. If that is what you want, I did not intend to say that. What I did intend to say was that I did not believe—and I thought I wrote that or made it plain—I did not believe they had, in fact done as you argued they had done.

I was not impressed that he wanted to get rid of this whole thing. It was something he fought to sustain and hired lawyers to sustain, and accomplished it by getting possession of it. I don't think he gave it up as readily as doing it by oral act. He knew how to execute solemn instruments, if he had wanted to.

I also still think, subject to your differing with me, which you undoubtedly do, that he knew about this proceeding over here in America, having followed the matter as carefully as he did, and that his son would not go through with an important matter of that sort without his knowledge.

My whole idea of the matter is different from yours. We are, of course, fallible. I thought plainly that Wilhelm

followed this property pretty intimately through Frankenberg all the time. I felt it before the case ended. That is why I asked you to argue it very carefully. This is the finding I reached. I do not mind telling you the closest thing I had to decide was between this and whether the whole matter was a sham. I thought the weight of the evidence was this way.

I will change that as I have indicated:

3172 " * * * by any statement or act."

That will make it perfectly plain.

Is there any objection to No. 53? Didn't get that right?

Mr. Boland: Just a few things; very minor changes.

"A person having a usufruct * * *"

I think basically what we have here is exactly the same as this, with the exception of (d), and in your opinion you spelled out the three views. This finding, however, it seems to me, is finding 2, under one view. It seems to adopt the third view, and if the Court is going to adopt one of the three views, the logical view to adopt is the middle view, because that is what is stated in Hachenburg's draft.

The Court: Let me get this in my mind. What do you want changed?

Mr. Boland: I would like to have (e) in your findings changed to the rights which are set forth in Hachenburg's draft, which is the middle view, which is a right to vote in respect of.

The Court: I am perfectly willing to cover all dividends.

Mr. Boland: Well, certainly we do not want the strongest one against us incorporated.

Mr. Burling: I am perfectly willing to have plaintiff's proposed (d) substituted for Your Honor's (e). I should like your Honor's finding otherwise to remain un-

3173 changed.

The Court: All right.

Mr. Burling: My friend's proposal actually works in another change which I object to.

The Court: I will incorporate Mr. Boland's (d) as my (e).

Mr. Boland: That accomplishes it pretty much.

The Court: I did not see that.

Mr. Boland: I thought it was inadvertent, because in your opinion you spelled out the three.

On finding No. 54, the only thing we have is an addition:

• • • • • However, Wilhelm or Marta von Opel never demanded nor received any income of any nature from the usufruct."

The Court: That is correct, isn't it, Mr. Burling?

Mr. Burling: With the exception of certain sums—rather small sums—paid to them when they were out of Germany.

Mr. Boland: You don't claim they came under the usufruct, do you?

Mr. Burling: They came out of the plaintiff; I don't know whether they came out of the usufruct.

Mr. Boland: They did not come out of the plaintiff; they came out of Fritz von Opel.

Mr. Burling: That is not so.

The Court: I will include that; then you can add 3174 the other if you want to.

Mr. Burling: Yes, I would like it added.

The Court: You can say, "Fritz von Opel"; whatever the record shows.

Mr. Boland: How much they received.

The Court: "Fritz von Opel advanced moneys for a trip" so and so. You can work that in there.

Mr. Burling: I do not know what procedure I have to work it in.

The Court: I have put in here:

"Neither Wilhelm nor Marta von Opel ever received or demanded any income from"—

Mr. Burling: It was the plaintiff corporation.

The Court: "plaintiff corporation."

Mr. Boland: But it was charged to Fritz von Opel on the books of the plaintiff corporation, so that is still Fritz von Opel.

The Court: Whatever the record shows.

Mr. Boland: It shows it is charged to Fritz von Opel.

Mr. Burling: The record shows it is funds taken from the plaintiff corporation.

The Court: All right, "plaintiff corporation." "on occasions paid."

Mr. Boland: "expenses for a trip to South America."

Mr. Gallagher: "and paid for shooting stag in 3175 Hungary."

The Court: You can dictate that. I will mark that.

"Plaintiff corporation on occasions paid expenses"; and then I will say, "dictated."

Now, why do I have to make a lot of findings of law?

Mr. Gallagher: Your Honor, I have to make one other request as to No. 57. That is the last one. I would like that to read:

"Fritz von Opel is 50 years of age and has no issue"; and then I would like to go further and say:

"His father, Wilhelm von Opel, died in 1948, and his mother, Marta von Opel, is at present 75 years of age."

The Court: That is all right. Do you want to say anything about the sister?

Mr. Gallagher: No.

Mr. Burling: If you are going to discuss conditions now rather than condition at the time of vesting, which we contend is relevant, I think Your Honor should also find that she is now alive.

Mr. Gallagher: The Court has found that she is now alive. I merely said she is 35 years of age.

Mr. Burling: I am talking about the sister.

Mr. Gallagher: There is a finding showing that she is living in Switzerland. I presume she is not 6 feet under.

3176 The Court: Gentlemen, I shall have to leave here in four minutes. Why do we have to have all these conclusions of law?

Mr. Gallagher: Changes?

The Court: Yes.

Mr. Gallagher: Because we think the conclusions as they now stand, Your Honor, if I may say so, are not fully accurate, in the light of some of the changes in the findings and some of the suggestions that have been made.

The Court: I will tell you what I am going to have to get you to do in these findings of law. I had to make an engagement. I thought we would get through with this much sooner. I should not have thought that.

Mr. Gallagher: Your Honor, we would like to point out one thing in your opinion. You make reference, inadvertently, on a number of occasions to the use of the word "ownership" in discussing the usufructuary. As your findings now property do reflect, and as the testimony of the experts on both sides reflected, the title is in Fritz. The parents have a usufructuary interest in this property.

The Court: "Ownership" is a very broad term. You can't be too narrow. When you have a finding as to the law of Germany and what the interest is, the fact that I called it "ownership" in my opinion is not going to prejudice you at all. As long as you have a good, clear finding of what a usufructuary interest is, if I refer to it as ownership it is not going to hurt you.

3177

The Court of Appeals is not going to make its finding on my opinion. The only time they take findings of fact in an opinion is when we do not make adequate findings or make an adequate finding in this court. Then they scold